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THE
ONTARIO REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (THE COURT OF APPEAL FOR
ONTARIO AND THE HIGH COURT OF
JUSTICE FOR ONTARIO).

CITED [1945] O.R.

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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

1945

[COURT OF APPEAL.]

Harrison v. Toronto Motor Car Limited and Krug.

Motor Vehicles—Liability of Owner for Injury—Passenger—Limitations on Application of s. 47(2), The Highway Traffic Act, R.S.O. 1937, c. 288—Servant of Owner Riding in Automobile.

Although the language of s. 47(2) of The Highway Traffic Act is apparently free from ambiguity, and is wide enough, if interpreted literally, to exempt the owner and driver of a motor vehicle from any liability for injuries to a person being carried in the vehicle, whatever the circumstances, yet the subsection should not be so construed, but should be limited in its effect to the special statutory liability created by s. 47(1), which liability did not exist at common law. If, therefore, an action for damages is brought for injuries sustained by the plaintiff while riding in the defendant's automobile, but the action is based, not upon the statute, but upon some other ground, *e.g.*, upon the relationship of master and servant existing between the parties at the time, the subsection is inapplicable. *Hughes v. J. H. Watkins & Co.* (1928), 61 O.L.R. 587; *Dufferin Paving and Crushed Stone, Limited v. Anger et al.*, [1940] S.C.R. 174, distinguished.

Master and Servant—Liability of Master for Servant's Negligence—Permanent and Temporary Master—Owner of Automobile Hiring Driver from Motor Company.

Where an automobile dealer supplies "chauffeur's services" to the owner of an automobile, providing a driver in return for payment by the owner to the company of a fixed rate per day, together with the driver's out-of-pocket expenses, the owner of the automobile becomes the temporary master of the driver, and liable for his negligence, and the company, although it continues to be the general employer, is not vicariously liable for the consequences of the driver's negligence. *Rourke v. The White Moss Colliery Company* (1877), 2 C.P.D. 205; *Donovan v. Laing, Wharton, and Down Construction Syndicate, Limited*, [1893] 1 Q.B. 629; *Century Insurance Company, Limited v. Northern Ireland Road Transport Board*, [1942] A.C. 509, and other authorities, applied.

Master and Servant—Master's Liability for Injury to Servant—Defence of Common Employment—What Must be Established.

The defence of common employment is available only where the injured servant and the servant directly responsible for the injury are employed, not only by the same master, but, broadly speaking, on a common undertaking. *Bartonshill Coal Company v. McGuire* (1858), 3 Macq. 300; *Radcliffe v. Ribble Motor Services Limited*, [1939] A.C. 215, applied. A trained nurse, professionally accompanying her

patient on a motor trip, is not engaged in common work with the driver of the automobile, and if she is injured as a result of his negligence, her claim for damages will not be defeated by the doctrine of common employment. *Pollock v. Charles Burt, Limited*, [1941] 1 K.B. 121, applied.

Negligence—Defences—Volenti non Fit Injuria—Necessary Elements of Defence.

To establish the defence of *volenti non fit injuria*, the defendant must show that the plaintiff not only perceived the existence of the danger, but also fully appreciated it and voluntarily assumed the risk, and this is a question of fact. *Membery v. The Great Western Railway Company* (1889), 14 App. Cas. 179; *Smith v. Charles Baker & Sons*, [1891] A.C. 325; *Letang v. Ottawa Electric Railway Company*, [1926] A.C. 725, applied.

Executors and Administrators—Survival of Causes of Action against Estate—Action Based on Vicarious Liability for Negligence — The Trustee Act, R.S.O. 1937, c. 165, s. 37(2).

Section 37(2) of The Trustee Act, which provides that where a deceased person has committed a wrong (other than libel or slander), the person wronged may maintain an action against his estate, should not be limited to wrongs committed by the deceased in person, but also preserves a cause of action based upon the vicarious liability of the deceased for the negligence of an employee: *qui facit per alium facit per se*.

Workmen's Compensation—Application of Statute—Nurse Engaged to Attend Owner of Manufacturing Business on Business Trip — The Workmen's Compensation Act, R.S.O. 1937, c. 204, Part II.

Semble, where a trained nurse is engaged to attend the owner of a manufacturing business, accompanying him on a business trip undertaken on behalf of the company, she is within Part II of The Workmen's Compensation Act.

AN APPEAL by the plaintiff from the judgment of McFarland J., dismissing the action. The facts are fully stated in the reasons for judgment.

14th and 15th September 1944. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and GILLANDERS JJ.A.

F. J. Hughes, K.C., for the plaintiff, appellant: A nurse on professional duty does not come within s. 47(2) of The Highway Traffic Act, R.S.O. 1937, c. 288. In any event, the action is not brought against the Krug estate as owner, but as employer, and the plaintiff relies on her rights at common law, founded on the relationship of master and servant. Section 47(2) does not excuse the defendant company, since it was in the business of carrying passengers for compensation, and it is not material whose car was used. If the appellant does come within s. 47(2), then only the driver of the car is relieved of liability, and the common law should not be interfered with except where the statute clearly alters it.

A recent case is *Bowater v. Rowley Regis Corporation*, [1944] 1 K.B. 476. [HENDERSON J.A.: That case is concerned with a master's negligence; here there is no negligence of the master.] The question is who is the master. It is difficult to establish in the circumstances of this case: see *Century Insurance Company, Limited v. Northern Ireland Road Transport Board*, [1942] A.C. 509. The defendant company continued throughout to pay the driver; he remained its employee. [GILLANDERS J.A.: You say there was no transfer of his employment to Krug, who simply obtained chauffeur's services?] [ROBERTSON C.J.O.: Everything was left to Krug's direction. In the case you cite, the employer had a contract to perform, and sent his servant to carry it out. That is not this case.] If the Court is of the opinion that the driver was not an employee of the company, then we take the position that he was an employee of Krug.

The plaintiff was not *volens*: *Smith v. Charles Baker & Sons*, [1891] A.C. 325. [GILLANDERS J.A.: You argue that there should have been some more definite appreciation of the danger by her to make her *volens*?] Yes.

Section 47(2) of The Highway Traffic Act should be strictly construed. It merely exonerates a person from liability *qua* owner. It has never been applicable to the relationship between master and servant, and the plaintiff sues primarily on this basis, at common law. That relationship governs the liability, both in contract and in tort: *Re Ingersoll*; *Gray v. Ingersoll* (1888), 16 O.R. 194 at 198. There is nothing in the statute to disturb the relationship. As the section should be strictly construed, so the exception, as to carrying passengers for hire, should be liberally construed: *Green v. Dynes* (1938), 159 L.T. 168.

The trip during which the accident occurred was a business trip on behalf of Wood Products Company, which was owned by Krug. The business was within the scope of The Workmen's Compensation Act, R.S.O. 1937, c. 204, as amended: *Wiznoski v. Peteroff et al.*, [1938] O.R. 113 at 115, [1938] 2 D.L.R. 205. We come within ss. 120 to 124 of the Act, and therefore do not have to prove negligence.

For a discussion of the meaning of "casual", see *Hill v. Begg*, [1908] 2 K.B. 802.

J. R. Cartwright, K.C., for the defendant company, respondent: The driver was Krug's servant in respect of control, as

to where he should go and what he should do. It is important to know the relationship between the driver and the company, and between the company and Krug. From the moment the driver entered Krug's car he was under his control. The action fails by reason of s. 47(2) of The Highway Traffic Act and s. 2(2) of The Negligence Act, R.S.O. 1937, c. 115; *Koos v. McVey*, [1937] O.R. 369 at 372, [1937] 2 D.L.R. 496; *Shaw et al. v. McNay et al.*, [1939] O.R. 368, [1939] 3 D.L.R. 656.

In any event, the plaintiff must fail because of the rule *volenti non fit injuria*. [ROBERTSON C.J.O.: There was no knowledge on the appellant's part of the fact that the driver was about to run off the road.] [GILLANDERS J.A.: Can she be considered *volens* when she was in the car as nurse to her employer?] Her duty may have been to insist that the car should not continue: *Andanoff v. Smith and Nadeff*, [1935] O.W.N. 415 at 418.

There is no reported case where the owner of a car has hired a person to drive his car and the driver's general employer has been held liable for any negligence of the driver: see Salmond on Torts, 9th ed., 1936, pp. 92-3. The test of vicarious liability is control. [HENDERSON J.A.: You suggest that as long as the man is driving Krug, he is under his control, though not in his general employment?] If the servant is transferred to Krug to the extent that Krug can direct what he is to do and how he is to do it, then Krug is responsible for any negligence on his part: *Jones v. Scullard*, [1898] 2 Q.B. 565; *The Consolidated Plate Glass Company of Canada v. Caston* (1899), 29 S.C.R. 624 at 626; *Samson v. Aitchison*, [1912] A.C. 844. Under the authorities, as between the defendant company and Krug, it was Krug who had control of the driver, and there is no way in which the company can be found liable. The driver was in our general employment, but from the time he started on the trip, he was under the particular control of Krug.

T. N. Phelan, K.C., for the defendant Krug, respondent: Under s. 47(2) of The Highway Traffic Act and s. 2(2) of The Negligence Act, complete immunity is afforded to the owner of a motor car when a passenger is injured: *Hughes v. J. H. Watkins & Co.*, 61 O.L.R. 587, [1928] 2 D.L.R. 176; *Dufferin Paving and Crushed Stone, Limited v. Anger et al.*, [1940] S.C.R. 174, [1940] 1 D.L.R. 1; *Miller v. Ryerson* (1892), 22 O.R. 369.

The Highway Traffic Act provides a complete code, and cannot be evaded by the plaintiff saying she is not suing us as owner. [HENDERSON J.A.: Your case is that the statute supersedes the common law?] [GILLANDERS J.A.: The statute merely created an added duty.]

Alternatively, if in law Krug was liable vicariously for the act of the driver, the cause of action does not survive against his estate. A proper construction of s. 37(2) of The Trustee Act, R.S.O. 1937, c. 165, makes it clear that the right of action survives against the estate of a wrongdoer only for a personal wrong, and not in respect of vicarious liability.

The finding that the plaintiff was *volens* is right in fact and in law: *Sigerseth v. Pederson*, [1927] S.C.R. 342, [1927] 2 D.L.R. 651; *Membery v. The Great Western Railway Company* (1889), 14 App. Cas. 179; *Stewart v. Godwin*, [1933] O.W.N. 712. Krug was incompetent to control the driver; the plaintiff was then charged with the responsibility. She was guilty of contributory negligence which caused her damage: *Gauley v. Canadian Pacific Railway Co.*, 65 O.L.R. 477 at 491, 36 C.R.C. 365, [1930] 4 D.L.R. 354; *Wilson v. Zeron et al.*, [1942] O.W.N. 195, [1942] 2 D.L.R. 580. There was on her a duty of care which she failed to discharge.

Krug (and therefore his estate) was not vicariously liable for any act or omission on the part of the driver. Where there are, so to speak, two masters at the same time, the principle upon which the Court determines which master is the *superior* for purposes of the maxim *respondeat superior* is authoritatively decided in *Century Insurance Company, Limited v. Northern Ireland Road Transport Board*, [1942] A.C. 509. The test is whether the servant is transferred, or only the use and benefit of his work. The courts lean against finding that the servant himself has been transferred, unless there is very clear evidence. [HENDERSON J.A.: In the case at bar there is nothing about transfer of the driver; he remains in two employments.] The Court must determine whether there has been any transfer. Our contract was for chauffeur services, not for any particular man. On the evidence in this case, the servant was never transferred from his original employer.

The Workmen's Compensation Act is inapplicable. The plaintiff is not a workman within an industry.

F. J. Hughes, K.C., in reply: *Maxwell v. Callbeck*, [1939] S.C.R. 440, [1939] 3 D.L.R. 580, is not an authority against us. There the plaintiff failed because of contributory negligence. The basis of the decision is set out in the reasons of Davis J. at p. 444. The present appellant was in no way guilty of contributory negligence.

As to The Workmen's Compensation Act, it is a reasonable conclusion that such a business as Krug's would employ a nurse for its employees, and the plaintiff is in that position.

Cur. adv. vult.

19th December 1944. The judgment of the Court was delivered by

GILLANDERS J.A.:—This is an appeal by the plaintiff from a judgment of Mr. Justice McFarland, dismissing her action for damages.

The appellant is a registered nurse, who was at all relevant times in the employ of the deceased, Albert E. Krug. Mr. Krug owned and operated a business called Wood Products Company, and while in Toronto on business he had need of medical and nursing attention, owing to his physical and nervous condition. Previous to the appellant being engaged, Krug had been attended at his hotel by his doctor and another nurse. On being called by the Central Registry of Graduate Nurses, the appellant went to the hotel to render her services. When she arrived another nurse was on duty. This other nurse went off duty after the appellant's arrival and the appellant went on 8-hour duty from 12 midnight to 8 o'clock the following morning, when the nurse who had been on duty the day before went on duty again for the day. The appellant was called again that evening and first went on 12-hour duty at the hotel where Krug was stopping, and then continued her services to him while he proceeded to Montreal, stopped for a short time at a hotel there and subsequently proceeded to the Maritime Provinces and returned.

Krug had his own motor car, but had arranged with the respondent Toronto Motor Car Limited to supply him with chauffeur's services. The motor company sent one McKenzie, who drove Krug's car. On returning they arrived in Toronto late at night, and, being unable to secure hotel accommodation, Krug decided to proceed to his home some distance from

Toronto, and desired the appellant and McKenzie to continue with him. While the appellant would have preferred to discontinue her services, she felt that she should not leave her patient unattended and continued with him. While going from Toronto to his home, owing to the negligence of the driver McKenzie in getting on the wrong side of the road, the car in which they were riding, owned by Krug, came into violent collision with another car on the highway. As a result of this unfortunate accident Krug was killed, and the appellant suffered very severe and grievous injuries. In due course she brought this action against Krug's estate and against the motor company, claiming damages for her injuries.

The claim against the motor company is based on the allegation that it is responsible in law to the plaintiff for the negligence of McKenzie, whose negligence caused the casualty. By way of defence the motor company raised, among others, two defences: (1) that no action lay by virtue of s. 47(2) of The Highway Traffic Act, R.S.O. 1937, c. 288; and (2) that in any event, under the circumstances, if anyone was vicariously responsible for the negligence of the driver McKenzie it was the deceased Krug, and not the motor company. Krug apparently arranged with the motor company for "chauffeur services". They sent McKenzie to render these services, and were to be paid \$10 a day and, in addition, the driver's out-of-pocket expenses for board and lodging.

In *Donovan v. Laing, Wharton, and Down Construction Syndicate, Limited*, [1893] 1 Q.B. 629, Lord Esher M.R. quotes with approval and applies the statement of Cockburn C.J. in *Rourke v. The White Moss Colliery Company* (1877), 2 C.P.D. 205: "But when one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

In *Union Steamship Company, Limited v. Claridge*, [1894] A.C. 185 at 188, Lord Watson states: "That the servant of A. may, on a particular occasion, and for a particular purpose, become the servant of B., notwithstanding that he continues in A.'s service and is paid by him, is a rule recognized by a series of decisions."

In *The Consolidated Plate Glass Company of Canada v. Caston* (1899), 29 S.C.R. 624 at 627, after distinguishing *Jones v. Scullard*, [1898] 2 Q.B. 565 on the facts, the Court states: "A fair and reasonable test to apply, is this: Could the hirer have himself taken absolute control of the vehicle, horse and harness, taking it altogether out of the possession of the driver?"

In *Perkins v. Stead* (1907), 23 T.L.R. 433, the defendant had purchased a motor car in London and the vendor agreed to provide a driver to take the car to a place outside London where it was to be delivered. On the way, with the defendant and others in the car, a collision occurred with a bicycle. In an action brought by the cyclist it was held, following *Jones v. Scullard*, *supra*, and *Rourke v. The White Moss Colliery Company*, *supra*, that the driver, though a general servant of the vendor, was at the material time under the control of the defendant, who had the property in and possession of the car.

There is nothing at variance with the law applied in these cases in the recent decision of the House of Lords in *Century Insurance Company, Limited v. Northern Ireland Road Transport Board*, [1942] A.C. 509. The Lord Chancellor, Viscount Simon, says in part, at p. 513:

" . . . no one disputes the proposition that a man may be in the general employment of X. and yet at the relevant moment, as the result of arrangements made between X. and a third party, may be the servant of the third party so as to make the third party and not X. responsible for his negligence, and I agree that the test to be applied is the test formulated by Bowen L.J. in *Donovan v. Laing, Wharton, and Down Construction Syndicate, Limited*, [1893] 1 Q.B. 629, 633, 634, namely, 'in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act.' " And Lord Wright observes at p. 515:

"In *M'Cartan v. Belfast Harbour Commissioners*, [1911] 2 Ir. R. 143, this House emphatically stated that it is a question of fact how the maxim *respondeat superior* is to be applied in any particular case of this character. The problem is to determine who is the 'superior' in the particular instance. Lord Dunedin said categorically that the facts of one case can never

rule another case and are only useful so far as similarity of facts (for identity, the word so often used, is really a convenient misnomer) are a help and guide to decision, but, all the same, it has been sought to find some general idea, or perhaps mere catchword, which may serve as a clue to solve the problem, and for this purpose the idea or the word 'control' has been introduced."

It is clear here that the motor company placed their man McKenzie at Krug's disposal. He remained in their general employment and was paid by them, but the direction and control of McKenzie in respect of the work on which he was then engaged was transferred to Krug. On the facts here the motor company cannot be held vicariously liable to the appellant for McKenzie's negligence.

Both respondents raised as against the appellant the defence of *volenti non fit injuria*, and the learned trial judge gave effect to this defence. This is based on evidence that the driver, McKenzie, had little sleep on the journey to Montreal and the Maritime Provinces, and particularly during the last two or three days of the trip; that he was showing signs of fatigue before and during the portion of the journey from Toronto to Krug's home, and, in the words of the trial judge, "There is evidence also that Krug insisted on having all the windows of the car tightly closed, although the month was August, and the atmosphere in the car was distinctly soporific." To establish such a defence, it must be shown that the appellant not only perceived the existence of danger, but also fully appreciated it and voluntarily assumed the risk, and this is a question of fact: *Membery v. The Great Western Railway Company* (1889), 14 App. Cas. 179; *Smith v. Charles Baker & Sons*, [1891] A.C. 325; *Letang v. Ottawa Electric Railway Company*, [1926] A.C. 725, [1926] 3 D.L.R. 457, 41 Que. K.B. 312, [1926] 3 W.W.R. 88, 32 C.R.C. 150. Without reviewing the facts in detail, I think that the evidence here falls far short of establishing that the appellant knew, fully appreciated, and willingly assumed, the risk, and that the doctrine of *volens* cannot be successfully raised in answer to her claim. The evidence also fails to establish that she was guilty of contributory negligence.

The statutory defence raised has given me much consideration. It is urged that The Highway Traffic Act, R.S.O. 1937,

c. 288, s. 47(2), provides a complete defence for both respondents, and that The Negligence Act, R.S.O. 1937, c. 115, s. 2(2), has the same effect. Section 47 of The Highway Traffic Act reads as follows:—

“47.—(1) The owner of a motor vehicle shall be liable for loss or damage sustained by any person by reason of negligence in the operation of such motor vehicle on a highway unless such motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner shall be liable to the same extent as such owner.

“(2) Notwithstanding the provisions of subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, shall not be liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from such motor vehicle.”

For the appellant, Mr. Hughes contends (1) that under the circumstances the motor vehicle involved was being operated in the business of carrying passengers for compensation, and (2) that in so far as the liability of the Krug estate is concerned, the action is not based on any liability as owner of the motor vehicle, but is rested on the relationship of master and servant, and that the provisions of the statute are inapplicable.

It cannot be held on the facts here, either because Krug's car was being driven by a chauffeur supplied by the respondent motor car company, or because the appellant, in the course of rendering her nursing services, was at the time with her patient in the car, that the motor vehicle was at the time in the business of carrying passengers for compensation.

The contention that, in any event, the subsection is only intended to relieve the owner *qua* owner, from the statutory liability imposed by subs. 1, is a much more substantial contention. Reading the words of subs. 2 literally, it might be thought that they contain no ambiguity. One could easily think of cases where, applied literally, the words would lead to a surprising result. For instance, should the owner of a motor vehicle while driving his car strike and injure his passenger, does the section bar any relief for the assault, since by the words of the sub-

section the damage is not in terms limited to that flowing from negligence in the operation of a motor vehicle? Or if the owner of a motor car abducted another person, took such person forcibly into his motor car and drove off, and in a collision resulting from his negligence, caused bodily injuries to such person, would such owner be freed of liability for the injuries suffered by his victim while being carried in the motor car? Or, again, if an employer should engage a servant under an express contract providing for the payment of compensation for any bodily injuries in the course of employment, and such injuries were suffered by the servant while carrying out his duties in a motor vehicle owned and driven by his employer, would the statute provide a defence? It is not necessary, of course, to consider what answer might be given to such questions, but they only serve to make clear the difficulty, and, indeed, the absurdity, of reading and applying the words of the subsection literally, divorced from other considerations. It is a primary rule in the construction of statutes that where the words of the statute are, in themselves, precise and unambiguous, no more is necessary than to give to the words their natural and ordinary sense, since they must be taken to declare the intention of the legislature. " . . . our business is to deal with what the legislature has said, not with what it might have said": Per Boyd C. in *Miller v. Ryerson* (1892), 22 O.R. 369. However, as stated in Maxwell on The Interpretation of Statutes, 8th ed., 1936, pp. 73-4:

"It is not infrequently necessary, therefore, to limit the effect of the words contained in an enactment (especially general words), and sometimes to depart, not only from their primary and literal meaning, but also from the rules of grammatical construction in cases where it seems highly improbable that the words in their wide primary or grammatical meaning actually express the real intention of the Legislature . . .

"It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual, or their natural sense, would be to give them a meaning other than that

which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act. The general words of the Act are not to be so construed as to alter the previous policy of the law."

There are numerous factors which indicate that the words of subs. 2 of s. 47 were not intended to be applied in their widest and most unrestricted literal sense. The statute in which the subsection occurs is concerned with the regulation of highway traffic, and largely, though not exclusively, with motor vehicles on highways. Read literally, it might be argued that the subsection insulates the owner and driver from all liability for injuries to a person being carried in such motor vehicle, even if the injuries were done wilfully and by means other than the faulty operation of the motor vehicle. The more reasonable view is that the application is limited to the objects of the statute in which it is found. It should also be borne in mind that the legislature is presumed not to intend any substantial alteration in the law beyond the immediate scope and object of the statute under consideration.

At common law there was no liability on the owner of a motor vehicle merely by reason of ownership for injuries which the motor vehicle might occasion while being driven by another. The liability imposed on the owner by what is now s. 47(1) arises wholly by reason of the statute. It is quite reasonable to read subs. 2, immediately following, as excluding the owner from the liability specifically imposed by subs. 1 in respect of persons mentioned in the subsection. It is true that the damages in the action at bar resulted from negligence in the operation of a motor vehicle on the highway. That aspect adds some weight to the submission that the claim here might be thought to be within the scope and purview of the statute. With some hesitation, I am inclined to the view that one must go a step further, and consider whether the application of the section is not further limited.

In *Hughes v. J. H. Watkins & Co.*, 61 O.L.R. 587, [1928] 2 D.L.R. 176, the Court was considering the effect of a limitation section limiting the time within which an action might be brought against a person for the recovery of damages occasioned by a motor vehicle. A pedestrian was struck by a motor vehicle driven by an employee of the defendant owners. The action was

brought after the period of limitation provided by the statute, and the Court rejected the argument that the provision should be limited to an action based on the duties and burdens imposed by the Act, and that an action lay at common law and apart from the burdens and limitations of the statute, holding that whether the cause of action was to be regarded as arising under the statute or at common law, the statutory limitation applied. So also in *Dufferin Paving and Crushed Stone, Limited v. Anger et al.*, [1940] S.C.R. 174, [1940] 1 D.L.R. 1; the section there being considered provided that "no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained."

I incline to the view that the essential difference between the limitation sections considered in the *Watkins* and *Dufferin Paving* cases and the section with which we are here concerned is that the limitation sections in the cases mentioned were of general application, affecting all actions "for the recovery of damages occasioned by a motor vehicle", while the subsection now under consideration only affects the liability of the owner or driver to a certain type of action. The conclusion in the cases mentioned is, I think, not applicable here. The provisions now being considered, being directed to the liability of the owner and driver, should be restricted to their liability *qua* owner and *qua* driver, and I think may not bar a right of action due to some other relationship. If the appellant has a cause of action against her master by reason of the negligence of his servant, subs. 2 does not take it away, even though at the time it arose she was being carried in her employer's motor vehicle.

Is the appellant's action barred by reason of her being at the time in common employment with the driver McKenzie? At common law the defence of common employment has been recognized since the leading case of *Priestley v. Fowler* (1837), 3 M. & W. 1, 150 E.R. 1030, in which Lord Abinger C.B. discussed the reasons for the application of the principle. It has been the subject of much litigation although its application more recently has been much restricted by the provisions of The Workmen's Compensation Act, now R.S.O. 1937, c. 204.

Referring to the doctrine in *Radcliffe v. Ribble Motor Services Limited*, [1939] A.C. 215, Lord Atkin observes, at p. 223:

"At the present time this doctrine is looked at askance by judges and textbook writers. 'There are none to praise, and very few to love.' But it is too well established to be overthrown by judicial decision."

And Lord Wright in the same case, at p. 245, says:

"I ventured in *Wilsons & Clyde Coal Company, Limited v. English*, [1938] A.C. 57, to express some criticism of the doctrine, which I cannot help regarding as an arbitrary departure from the rules of the common law based on a prejudiced and one-sided notion of what was called public policy, and sanctioned by no previous authority."

In order to raise the defence successfully it is necessary that the employees concerned be engaged, not only in the service of a common master, but, broadly speaking, in a common undertaking.

In *Bartonshill Coal Company v. McGuire* (1858), 3 Macq. 300 at 307, Lord Chelmsford L.C. said:

"It is necessary . . . in each particular case to ascertain whether the servants are fellow-labourers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him. There may be some nicety and difficulty in particular cases in deciding whether a common employment exists; but generally, by keeping in view what the servant must have known or expected to have been involved in the service which he undertakes, a satisfactory conclusion may be arrived at."

In *Radcliffe v. Ribble Motor Services Ltd.*, *supra*, the principle is exhaustively discussed and redefined, and certain limitations of its application are indicated. In dealing with the limitations of the doctrine, Lord Wright says, at p. 249:

"But it is clear on the authorities in this House that there is always the limit, however expressed, that it must be the same

work in which the workmen are employed. They must be employed in common work, that is, work which necessarily and naturally or in the usual course involves juxtaposition, local or causal, of the fellow employees and exposure to the risk of the negligence of one affecting the other. According to the cases the nexus may be some general undertaking, which, however large it may be, can be regarded by the Court as a unit, as a colliery was regarded in *Wilson v. Merry & Cunningham* (1868), L.R. 1 H.L. (Sc.) 326, where it was held that there was common employment between the miner and the works managers, notwithstanding the difference in grade and responsibility between them; similarly in the navigation of a ship as in *Hedley v. The Pinkney & Sons Steamship Company, Limited*, [1894] A.C. 222, where the common employment was between the master and the seaman. The inter-dependence of the employees who are all engaged in the same work is obvious in such cases."

And later, on p. 250: "It is true, as Lord Chelmsford said in the *Bartonshill* case (3 Macq. 300, 307), that there may be difficulty in deciding the question whether it was the same work on which the men were engaged. But all the same the question is vital, especially in the more complex organizations of industry in modern times."

And again, at p. 251: "If the risk from the fellow servant's negligence is accidental, as in the facts stated by Sir Francis Jeune, and not incidental to the employment, if the men are engaged to act on independent jobs which do not necessarily or in the ordinary course bring them into relation, if the risk from the fellow servant is only the same risk as from men employed by other masters in the same type of occupation, if there is no common object immediate or remote between the employments of the fellow employees, even though concerned in the same class of work except that they are all engaged in seeking to make money for the same employer, I think there is *prima facie* no case of common employment."

In *Pollock v. Charles Burt, Limited*, [1941] 1 K.B. 121, on the facts there, keeping in mind the limitations of the doctrine indicated in the *Radcliffe* case, the Court held that the servants in question were not engaged in the same common work, nor were they fellow-labourers in the same work, but were in fact engaged in different departments of duty, and the doctrine had

no application. The case has aspects of similarity to the case at bar. The appellant, as a professional nurse caring for her patient, was not engaged in common work with McKenzie driving the motor car. The type of service she was rendering was obviously quite different from and unconnected with that of McKenzie. There was no interdependence between them. When she was engaged her patient was a guest at a hotel. It is true that before Krug left Toronto she agreed to go with him as his nurse, but the essential character of her employment was not altered. Her nursing services to her patient went on quite apart from where he might be in the course of travel. Her services and those of the driver McKenzie could not be said to have a common object. Her engagement was to render nursing services, and to attend to the physical health of her patient, irrespective of where he might be. McKenzie was merely driving the motor car. It is not necessary to consider whether a registered nurse could, under other circumstances, be held to be in common employment with a servant rendering services of a somewhat different character, but with the common object of ministering to the health of her patient. It is sufficient to conclude that on the facts here, common employment should not stand in the way of the appellant's claim.

If I am right in concluding that common employment is not applicable under the circumstances, it is not necessary to consider whether or not the appellant comes under Part II of The Workmen's Compensation Act, in which case in any event, by virtue of s. 122 of that Act, common employment would have no application. It is, however, probably desirable to express my view on this point.

Portions of the examination for discovery of the respondent Ethel Amelia Krug, the administratrix of her deceased husband's estate, which were put in as part of the plaintiff's case, show that the deceased Krug was the sole owner of a business called Wood Products Company; that on the trip in question "he left home to go to Toronto on business for the Wood Products Company", and that he had in mind going to the Maritime Provinces to see his brother "on business and advice." The accident occurred while Krug was returning to his home from Toronto, where he had gone on business for his firm. The appellant herself says that her employer told her he was on a business trip for his

company. One would think that if the appellant, a registered nurse, had been engaged to render skilled nursing services when required as a result of injuries received by employees at the plant, or assist in the care of employees' health there, she would be entitled to the benefits of the Act. If she is engaged to care for the health of the owner of the business while he is engaged on firm business, is she in any different position? I think not. The fact that she may have been a casual employee is not important. She could not be said to be a domestic or menial employee, and excluded by virtue of s. 124: *Jarvis v. Oshawa Hospital*, [1931] O.R. 482, [1931] 4 D.L.R. 914. Under the circumstances here, the appellant, I think, falls within the provisions of Part II of the Act.

Mr. Phelan, in his able argument, submits in passing that if the deceased Krug were vicariously liable for McKenzie's neglect, the cause of action does not survive against his estate. Section 37(2) of The Trustee Act, R.S.O. 1937, c. 165, provides:—

“(2) Except in cases of libel and slander, if a deceased person committed a wrong to another in respect of his person or property, the person wronged may maintain an action against the executor or administrator of the person who committed the wrong.”

It would be too narrow and restricted a construction to hold that this was limited only to wrongs committed by the deceased in person. *Qui facit per alium facit per se*. The cause of action survives against the estate of the deceased.

It is objected that as against the Krug estate there is no corroboration of the appellant's evidence as required by The Evidence Act, R.S.O. 1937, c. 119, s. 11. The record shows that in moving to strike out the jury notice and have the case tried by a judge without a jury, counsel for the Krug estate, *inter alia*, stated: “He [referring to Mr. Krug] employed Miss Harrison as his nurse,” and again, “We say this woman was employed to take care of Krug as a nurse . . . I do not think she did her duty as a nurse.” With this statement on the record, it cannot now be urged that the claim fails because there is no corroboration of her evidence that she was employed by Krug as a nurse. There seems ample evidence on the record other than that of the appellant to show that the accident was caused by the negligence of the driver of Krug's car.

In the result the appeal against Toronto Motor Car Limited fails, and must be dismissed with costs, but the appeal against the dismissal of the action against the Krug estate should be allowed with costs, and judgment should be directed to be entered in favour of the appellant for the sum of \$7,500, together with costs of the appeal and costs which she may be called upon to pay to Toronto Motor Car Limited. The third party proceedings should be dismissed with costs.

Appeal allowed in part, with costs.

Solicitors for the plaintiff, appellant: Hughes, Agar, Thompson & Amys, Toronto.

Solicitors for the defendant company, respondent: Smith, Rae, Greer & Cartwright, Toronto.

Solicitors for the defendant administratrix, respondent: Phelan, Richardson, O'Brien & Phelan, Toronto.

[COURT OF APPEAL.]

Yachuk v. The Oliver Blais Company Limited et al.

Negligence—Sale of Gasoline to Young Children—Sufficiency of Enquiries—Container—Contributory Negligence—The Gasoline Handling Act, R.S.O. 1937, s. 332, s. 12, as amended by 1938, c. 14, s. 2, and Regulations thereunder.

The defendant company's servant, B., sold five cents' worth of gasoline to the infant plaintiff, then aged nine, and his younger brother, aged seven. The boys told B. that they wanted the gasoline to start their mother's car, which was "stuck down the street", but their intention was to soak bulrushes in it and then light them to make torches for a game. Having obtained the gasoline and soaked a bulrush in it, the infant plaintiff set fire to the bulrush, which his younger brother was then holding. The younger boy, frightened at the size of the flame, attempted to beat it out on the ground, with the result that the gasoline remaining in the can caught fire, setting fire to the clothes of the infant plaintiff, and causing him severe injuries.

Held, affirming the judgment at trial in this respect, the defendant company, through B., had been guilty of negligence. A person of common sense and ordinary intelligence, placed in B.'s position, should have seen that there was likelihood of injury happening to these two small boys when he placed in their hands such a dangerous substance, and it was his plain duty to refuse in the circumstances. *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229, applied. The act of the infant plaintiff in igniting the bulrushes could not be considered *novus actus interveniens*. *Latham v. R. Johnson & Nephew, Limited*, [1913] 1 K.B. 398 at 413, applied.

Held, further, the trial judge's finding of contributory negligence against the infant plaintiff could not be supported, and was inconsistent with the finding that B. had been negligent in supplying the gasoline to him. If the infant plaintiff was a person who could be reasonably responsible for the use of gasoline in the circumstances, there would be no liability on the defendant. If, on the other hand, it was negli-

gence on the part of the defendant to put gasoline into the hands of the two boys, it could not be an answer to say that the boys had used it for a dangerous purpose. *Lynch v. Nurdin* (1841), 1 Q.B. 29 at 38; *Cooke v. Midland Great Western Railway of Ireland*, *supra*, at 237, applied.

Infants—Negligence—Contributory Negligence of Boy of Nine—Danger Not Obvious and Apparent.

It is one thing to hold that a boy of nine is guilty of contributory negligence where the danger is obvious and apparent even to a child, as in highway cases, but where the danger is not obvious or apparent, and the knowledge necessary for its apprehension cannot be attributed to the boy, it is another thing. This is especially true where there is, either in the substance put into the child's hands or in the condition of things to which he has access, something in the nature of a temptation or allurement.

AN APPEAL by the plaintiffs, and a cross-appeal by the defendant The Oliver Blais Company Limited, from the judgment of Urquhart J., [1944] O.W.N. 412, [1944] 3 D.L.R. 615. The facts are fully stated in the reasons for judgment.

7th and 8th November 1944. The appeal was heard by ROBERTSON C.J.O. and ROACH and MCRUER JJ.A.

J. L. G. Keogh, for the plaintiffs, appellants: The trial judge should have found that the defendants committed a breach of Regulation 39 made under s. 12 of The Gasoline Handling Act, R.S.O. 1937, c. 332, as amended by 1938, c. 14, s. 2. We are concerned here only with exception (b). "Required" must mean not "requested" but "needed": *Gourlay et al. v. The Canadian Department Stores Limited*, [1933] S.C.R. 329 at 331-2, [1933] 3 D.L.R. 238. The other important word in the exception is "refuel", and this must mean restocking with fuel, not merely priming the carburetor. [ROBERTSON C.J.O.: Assuming that there was a breach of the Regulation, is it not somewhat remote from the accident?] No, because the fire could not have taken place if the unused gasoline had been in a safety container. A breach of the Regulation is *prima facie* evidence of negligence, because this was just such a transaction as the Regulation envisages: *Direct Transport Co. Ltd. v. Cornell*, [1938] O.R. 365, [1938] 3 D.L.R. 456. Had the trial judge found that there had been a breach of the Regulations, he might have made an entirely different apportionment of negligence.

2. The infant plaintiff should not have been found guilty of contributory negligence, and in any event the apportionment of fault is erroneous. The same standard of care is not to be applied to a boy of nine as to a grown man. [ROBERTSON C.J.O.:

Would not one important way of arriving at the apportionment be to ask which was the most obviously dangerous act? Yes, but even the most intelligent boy of nine cannot be expected to foresee all the consequences. [ROBERTSON C.J.O.: Once it is established, on a consideration of all the circumstances, that the plaintiff was negligent, does his age enter also into the apportionment, as distinct from the existence, of negligence?] A breach of the Regulations, if there was such a breach, is a serious matter, as are the other findings of negligence against the defendant, and they should raise the proportion over 25 per cent. [ROBERTSON C.J.O.: Have you any case where a person has been found liable for supplying a dangerous article to someone for whose subsequent acts he is not responsible?] The only case remotely on that point is *Dixon v. Bell* (1816), 5 M. & S. 198, 105 E.R. 1023; I refer also to *Wasney v. Jurazsky*, 41 Man. R. 46, [1933] 1 W.W.R. 155, [1933] 1 D.L.R. 616 at 617. As to the right of the Court of Appeal to vary the apportionment of negligence, see *Carter et al. v. Wilson*, [1937] O.R. 499 at 502-3, [1937] 3 D.L.R. 92; *Turcotte v. Mee*, [1940] 2 D.L.R. 228 at 230, 234.

3. The father's damages should not have been reduced by reason of the infant's contributory negligence. The amount of these damages was admitted. The old doctrine of identification in such cases has been changed. The decisions in *Knowlton v. Hydro-Electric Power Commission of Ontario*, 58 O.L.R. 80 at 92-94, 32 C.R.C. 362, [1926] 1 D.L.R. 217, and *McKittrick v. Byers*, 58 O.L.R. 158 at 162-164, [1926] 1 D.L.R. 342, were doubted by Anglin C.J.C. in *McLaughlin v. Long et al.*, [1927] S.C.R. 303 at 311-312, [1927] 2 D.L.R. 186, and should be reconsidered in view of *Oliver v. Birmingham and Midland Motor Omnibus Company, Limited*, [1933] 1 K.B. 35 at 37-40. The *Knowlton* case follows American decisions which are no longer applicable, since the enactment of The Contributory Negligence Act, and the point was not necessary to the decision in the *McKittrick* case. The question has been differently decided in Manitoba: *Wasney v. Jurazsky*, 41 Man. R. 46, [1933] 1 W.W.R. 155, [1933] 1 D.L.R. 616 at 618. See also *Dority v. Ottawa Roman Catholic Separate Schools Trustees*, 65 O.L.R. 360 at 363, [1930] 3 D.L.R. 633.

4. The award of damages to the infant plaintiff is wholly inadequate, having regard to the very severe injuries and disabilities, and the protracted pain and suffering. The trial judge has stated the correct principles, but his questioning of the medical witnesses shows that he thinks that there are "classes" of accidents. This also appears in his reasons. This is not sound: each case must be determined according to its own facts.

5. The case should not have been taken from the jury. The trial judge, in his reasons, gives three grounds for doing so: (a) counsel mentioned to the jury the amount of damages claimed; (b) the infant plaintiff wore short trousers in court, thus showing to the jury particularly horrible scars on his legs; and (c) the law was complicated. I was entitled to mention the amount claimed: *Bradenburg v. Ottawa Electric R.W. Co.* (1909), 19 O.L.R. 34 at 38. The trial judge says that this is not illegal, but that it is "bad form" and should not be done. This is changing the law as laid down in the *Bradenburg* case. The exposure of the boy's legs to the jury was very brief, and the trial judge said that he would have let either of these matters pass. I submit that the real reason was that set out above as (c), and that the trial judge did not consider himself competent to charge the jury. This is not a good ground for discharging the jury. [ROBERTSON C.J.O.: There are cases where the reasoning, and the principles to be applied, are so complicated that no jury could deal with the matter properly.] The trial judge can put questions to the jury, and then reserve judgment to look into the law. The plaintiff in an action based on negligence has a *prima facie* right to a jury. [ROBERTSON C.J.O.: The trial judge knew that there had already been one mistrial with a jury.] The circumstances of the first trial were exceptional. [MCRUER J.A.: The trial judge has a very wide discretion. How can we interfere?] The earlier law in this respect was changed by *Logan et al. v. Wilson et al.*, [1943] 4 D.L.R. 512 at 513. [MCRUER J.A.: Did the Court in that case discuss *Owens v. Martindale*, 63 O.L.R. 87, [1928] 4 D.L.R. 932?] No. I refer also to *Glesby v. Mitchell*, [1932] S.C.R. 260 at 264, 273, [1932] 1 D.L.R. 641.

J. J. Robinette, for the defendant company, respondent and cross-appellant: The action should have been dismissed. There should not have been a finding of negligence against us. The

trial judge found the facts in our favour, but erred in inferring negligence from the facts established. There is no doubt that the infant plaintiff obtained this gasoline by deceit. His pail had a lid, and Black twice asked him about dry cleaning. There was nothing to cause a reasonable person to anticipate such an extraordinary use of the gasoline; there was nothing to put Black on his guard. The boys did not have the bulrushes with them. [ROBERTSON C.J.O.: The trial judge says that the conduct of the boys should have awakened suspicion, and did in fact arouse it. Is that not enough?] It would be if the finding were justified, but the only doubt Black had was after the sale had been completed. The trial judge was not justified in finding that Black was suspicious before he made the sale. [ROBERTSON C.J.O.: There is something to be said for the proposition that it would be negligence in any circumstances to sell gasoline to two small boys like these.] It must depend on the particular boy and the particular circumstances. [ROACH J.A.: Should not the very fact that the infant plaintiff asked for five cents' worth of gasoline have aroused suspicion?] No, because the evidence shows that a very small quantity is enough for priming.

Even if we were negligent, the finding that the infant plaintiff was negligent is not questioned by the appellants, and the boy's negligence was the sole proximate cause of the accident; it was ultimate negligence. [ROBERTSON C.J.O.: It may be that the boy knew that it was dangerous to play with gasoline, but did he know that vapours arise from an open pail, and the other facts which played a part in causing the injury?] He knew that it was dangerous to light the gas-soaked bulrush. I do not argue that he was *volens*, but if the fact that he was negligent is accepted, his negligence must be deemed to be the sole effective cause. His act was conscious and deliberate, and constituted *novus actus interveniens*.

The Negligence Act, R.S.O. 1937, c. 115, is not applicable to this case at all. It arose out of admiralty actions, and the rule is admirably suited to fast-moving events. But it does not apply where there is a definite break in the chain of causation. The damages here were not "caused or contributed to" by the fault of two persons. There is nothing in the Act to eliminate the necessity for a causal connection between the negligence and the injury. [ROBERTSON C.J.O.: That is the principle ap-

plied, in slightly different circumstances, in *McLaughlin v. Long*, *supra*.] Yes; if the accident is caused wholly by the act of one person, because of a break in the chain of causation, it is not "caused or contributed to" by the negligence of another. *Gives v. Canadian National Railways*, [1941] O.R. 341, [1941] 4 D.L.R. 625, did not, as the trial judge says, destroy the doctrine of ultimate negligence. [ROBERTSON C.J.O.: There is a good deal of doubt as to the effect of The Negligence Act on the doctrine of ultimate negligence. The words "or contributed to" must not be overlooked, and are not quite the same as "caused".] There is nothing in the language of the Act that expressly abolishes ultimate negligence, and the common law doctrine should not be held to be abolished unless this necessarily follows from the wording of the statute. There was no continuing negligence of the defendant: the act was a complete one. [ROBERTSON C.J.O.: Is not the real difficulty that the trial judge has made two findings of negligence that cannot stand together? If it was negligence to supply the gasoline because the boy was not old enough to be trusted with it, how can it also be said that the boy was negligent because he should have known better?] [McRUER J.A.: There is a passage in 13 Halsbury, 2nd ed., pp. 584-5, as to the high duty when something is left where children can meddle with it.] That is based upon "meddling" by children, and in none of the cases is there any question of negligence on the child's part. [McRUER J.A.: But if the child's act consists of no more than was to be anticipated, can it be contributory negligence?] Yes, if the child is found to be capable of negligence. The essence of this case is that the infant plaintiff's own foolhardy act caused the injury: *Dominion Natural Gas Company, Limited v. Collins et al.*, [1909] A.C. 640 at 646.

The only duty on a vendor of gasoline is to warn the buyer if he has reason to believe that it may be put to a dangerous use. The case is within the category of the delivery of chattels which may be used for a dangerous purpose. We did perform our duty here, because the boy knew that gasoline was a dangerous substance, but only if used improperly, and the boy's statement to Black was that he intended to use it for a proper purpose. The general principle is discussed in Prosser on Torts, p. 667, s. 82; Pollock on Torts, 14th ed., p. 377; Salmond on Torts, 8th ed., p. 544.

As to the plaintiff's appeal: 1. This sale was within exception (b) set out in Regulation 39. The reasoning of the trial judge on this point is correct. Further, however, this particular section of the Regulations is *ultra vires* because the Lieutenant-Governor-in-Council had no power, in 1937, to make such a Regulation. In any case, any breach of the Regulation, if there was one, was not the cause of the accident; even with a safety can the boys could have achieved their purpose. A breach only makes the offender liable to a penalty, and does not give rise to civil liability: *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; *Wyant v. Welch*, [1942] O.R. 671, [1942] 1 D.L.R. 783.

2. The trial judge was entirely correct in his apportionment, and this question is one for his discretion: *British Fame v. Macgregor*, [1943] A.C. 197.

3. This point is settled in Ontario. *McLaughlin v. Long*, *supra*, casts some doubt on the rule, but does not disapprove it. After that judgment, this Court, in the *Dority* case, adhered to the previous rule. [MCRUER J.A.: Is there any distinction between a cause of action for loss of services and one for money expended by a husband or father in pursuance of his common law or statutory duties?] No distinction is made in the decisions. This Court is bound by its own prior decisions: *Young v. Bristol Aeroplane Company, Limited* (1944), 60 T.L.R. 536.

4. The trial judge's assessment of damages is generous. The permanent disability is limited to rigidity in both ankles. The Court will not interfere unless the award is outrageous.

5. The cumulative effect of the various matters mentioned by the trial judge entirely justified him in taking the case from the jury. He wisely exercised his discretion, having regard to the difficulties involved.

J. L. G. Keogh, in reply: I do not ask this Court to reverse itself as to identification, but only to re-examine the question. In both the *Dority* case and the *Knowlton* case the claim was by a husband. The *McKittrick* case held that The Contributory Negligence Act did not apply, and the other remarks were *obiter*.

The *British Fame* case, *supra*, is an admiralty one, and is distinguishable. The headnote shows that there may be circumstances in which an apportionment may be varied. Such a reapportionment has frequently been made by the courts.

Wyant v. Welch, supra, is not authority for the proposition that a breach of the Regulations does not give a civil right of action. The Court there was careful to point out that it was dealing, not with the breach of a statute, but with the breach of a municipal by-law. The Regulation is not *ultra vires*; it is within the omnibus clause (1) of s. 12 of the Act, as it stood before the 1938 amendment.

As to ultimate negligence, the old doctrine was an artificial one, created to relieve plaintiffs from the severity of the old rules of contributory negligence. With the enactment of The Negligence Act, the reason for the doctrine of ultimate negligence has disappeared.

The negligence of the defendant company continued up to the moment of the accident. There could have been no injury to the infant plaintiff, even if the bulrush had been ignited in the same way, if a safety container had been used, or if there had not been a quantity of gasoline in the open can. The trial judge expressly finds that the defendant's negligence was a *causa causans* of the accident. Gasoline is an inherently dangerous article, and the use made of it by the boys was not unexpected, but one which, as the trial judge finds, should have been anticipated.

Cur. adv. vult.

19th December 1944. The judgment of the Court was delivered by

MCRUER J.A.:—This action is brought by the infant plaintiff and his father to recover damages for injuries suffered by reason of the defendant The Oliver Blais Company Limited having negligently sold gasoline to the infant plaintiff and his small brother, which was ignited under circumstances that I will hereafter set out in some detail.

The Oliver Blais Company Limited, the respondent, is an incorporated company which, at the material times, operated a service station in the town of Kirkland Lake for the sale of gasoline and like products. Before delivery of the statement of claim the action was discontinued against Teck Imperial Service Station.

The infant plaintiff was seriously burned by the ignited gasoline, and heavy expense has been incurred by the adult plaintiff

for medical attention and hospitalization. At the trial the damages suffered by the infant plaintiff were assessed at \$8,000, and those of the adult plaintiff at \$2,712.75. Both the infant plaintiff and the defendant were found to be negligent, and the degree of fault was apportioned between them at seventy-five per cent. to the infant plaintiff and twenty-five per cent. to the defendant The Oliver Blais Company Limited. Judgment was therefore entered in favour of the infant plaintiff for \$2,000, and the adult plaintiff for \$678.19. The plaintiffs appeal and the defendant The Oliver Blais Company Limited cross-appeals.

The matter came on for trial before Urquhart J. and a jury at the assizes for the county of York, sitting at the city of Toronto. At the conclusion of the case for the plaintiff a motion was made on behalf of the defendant MacDonald for a non-suit. The motion was granted, and the action as against that defendant was dismissed without costs. Against this judgment there has been no appeal.

The trial of the action against the defendant, The Oliver Blais Company Limited, continued, and at the conclusion of the evidence the learned trial judge exercised his discretion to take the case from the jury and dispose of it himself. Counsel for the plaintiffs contends that the learned trial judge erred in taking the case from the jury. The learned trial judge has set out his reasons for the exercise of the discretion which was vested in him, and in the result I agree.

On the 31st July 1940 the infant plaintiff, who was at that time nine years of age, and his younger brother, seven years of age, obtained from their mother, who was ill in bed, five cents each for the purpose of buying chocolate milk. The infant plaintiff used his money for the purpose for which it was given to him. His younger brother did not. The two boys, having five cents between them, conceived the idea that they would procure some gasoline and make torches to "play Indians". The plan was to soak the heads of some bulrushes with gasoline and to light them. With this end in view the two boys set out to purchase the gasoline. In the first instance they went to a service station operated by one of the defendant's competitors, and requested gasoline, offering as a container a glass coffee jar. This they were refused on account of the fact that it was contrary to regulations prescribed for handling gasoline to de-

liver gasoline in a glass container. The boys went home and secured a tin lard pail. There is a difference in the evidence as to whether the pail had a cover on it or not. The learned trial judge has found that it did, and I accept his finding. The boys returned to the service station where they had been refused delivery of gasoline, and were again refused. They thereupon went to the service station operated by the defendants and asked one Black, the attendant in charge, a boy just under the age of fifteen years, for five cents' worth of gasoline. The younger of the two boys says that he said the gasoline was for an out-board motor. The learned trial judge has found that, if this was said, Black did not hear it.

Black's version of the transaction is, "He [the infant plaintiff] asked me for a nickel's worth of gasoline to put in his mother's car that was stuck down the street." With this the infant plaintiff substantially agrees. Both of the boys swore that the younger boy gave the money to Black. Black says he does not think it was the younger boy who had the money. On this point the learned trial judge makes no finding. He finds, however, for very cogent reasons, fully set out in his reasons for judgment, that Black had a real doubt about the purpose for which the gasoline was going to be used. In this finding I entirely agree. The circumstances of the whole transaction were such as to put any reasonable man on his guard and warn him that this was a fictitious story, put forward by two small boys who were bent on mischief. Black did nothing to verify the statement of the infant plaintiff, or to question him, except to ask him if he wanted the gasoline for dry cleaning. Black's evidence in reference to the transaction is as follows:

"Q. What did the older boy say to you?

"A. He asked me for a nickel's worth of gasoline to put in his mother's car that was stuck down the street.

"Q. What did you say?

"A. Well, I thought for a minute and then I asked him, 'Did you want it for dry cleaning?' That was our question that we always put to anything like that. And he said, No he didn't. So I got the pump going and then I asked him again if he wanted it for dry cleaning, and he said 'No'. And then I explained to him that if he did it was of no use as it contained lead and that there was another substance in the service station

which I could give him for dry cleaning if he wanted it for that so there was no need for gasoline, but he insisted it was not for gasoline [*sic*—his mother's car was stuck down the street and that is what he wanted it for."

Black reported the matter to the assistant manager of the service station and handed the five cents to him. The assistant manager asked what it was for, and Black's evidence is: "I said a couple of boys had come and obtained a small quantity of gasoline. And I says, 'That is all right, isn't it?' and he said, 'Yes', *as far as he knew. So that was all I thought about it then.*" (The italics are mine.)

Black was asked, "Did you have any doubt in your mind", and his answer was, "No, I was just—in a way—I mean it is a small quantity and that and I just thought the boys were still nearby and I could have got them then, and he [the assistant manager] seemed to think everything was all right, so I let it go."

The learned trial judge, in finding the defendant negligent, stated, "I am firmly convinced and I so find that the defendant's agent Black could reasonably have anticipated, when selling the gasoline to the infant plaintiff accompanied by his brother, that these would, in all probability, use the same for some dangerous purpose likely to cause them injuries, and particularly might use the same for lighting something and thus run the danger of being injured." With this finding I agree.

In *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229, Lord Macnaghten formulated the question applicable to that case, which may be applied to the circumstances of this case:

"The question for the consideration of the jury may, I think, be stated thus: Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least take ordinary precautions to prevent such an accident as that which occurred."

Applying the language of Lord Macnaghten to the facts of this case, I would put the question for consideration as follows: Would not a private individual of common sense and ordinary intelligence, placed in the position in which Black was placed, and possessing the knowledge which must be attributed to him, have seen that there was likelihood of some injury happening to these two small boys in whose hands he had placed a quantity of gasoline in a lard pail, and would he not have thought it his plain duty to refuse to deliver it to them under the circumstances?

Gasoline is a highly dangerous substance. It is not only very inflammable, but, in certain conditions, explosive. The vapours from it will ignite at some distance from the liquid itself. When a small quantity touches one's clothing, it makes the clothing inflammable. These facts are well known by the average adult, and ought to be known by anyone selling gasoline, and have a bearing on the duty of the defendant's servant, when putting such a substance into the hands of two boys, seven and nine years of age, under the circumstances of this case. These facts also have a bearing on what may be expected of children into whose hands there has been put a substance with such dangerous and tempting possibilities.

It was submitted on behalf of the defendant that notwithstanding the negligence of its servant, the chain of causation between his negligence and the damage sustained by the infant appellant was broken by the deliberate act of the infant plaintiff in lighting the bulrush which had been saturated with gasoline, and that the conduct of the infant plaintiff was the conscious act of another's volition and constituted *novus actus interveniens*.

I do not think this is an answer to the plaintiffs' claim. In my opinion the language of Lord Sumner (then Hamilton L.J.) in *Latham v. R. Johnson & Nephew, Limited*, [1913] 1 K.B. 398 at p. 413, applies:

"Children acting in the wantonness of infancy and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a *causa sine qua non*, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have

anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief."

Having determined that the defendant's servant was negligent in supplying gasoline to the infant plaintiff and his small brother, there remains to be considered whether the infant plaintiff can be held to be guilty of contributory negligence.

After obtaining the gasoline the two boys took it to a lane. The younger boy was sent home for the bulrushes, which he brought back. The boys called for two other boys, who were not at home. A boy, a year older than the infant plaintiff, came up the lane and prompted the infant plaintiff into lighting a bulrush. He said to him, "I dare you to light one of those. I bet you are afraid." The infant plaintiff then dipped the head of a bulrush in the gasoline and handed it to the younger boy, while he, the infant plaintiff, lighted it with a match which the smaller boy had brought from their home. The flame flared up and the younger boy, evidently being panic stricken, started to beat it on the ground instead of letting it burn away in the air. Between the two boys was the open pail of gasoline. It may be that after the bulrush was dipped in the gasoline and before it was lighted, gasoline had dripped on to the ground and on to the infant plaintiff's clothing. In any case, when the smaller boy beat the flaming bulrush on the ground the gasoline in the pail was ignited and the infant plaintiff's trousers caught fire and his legs were very seriously burned, resulting in permanent injuries, as set out in the learned trial judge's reasons for judgment.

The learned trial judge finds that the infant plaintiff was of such an age that he could be guilty of contributory negligence "in the abstract", and also "in respect of the handling of gasoline and gasoline fires." He gives as his reason for this that he was a bright boy, standing well in the grades at school, and that he knew the danger of matches. He had watched his father operate a gasoline torch in his workshop and had been told to get away from the torch. His father would not allow children in the workshop. He finds, "I have no doubt that the boy fully appreciated that gasoline was a dangerous substance, and had considerable knowledge that it burned in no ordinary manner." He finds that the infant plaintiff was negligent "in lighting the bulrush as he did, in the proximity of a can of gasoline, the con-

sequences of which I think he ought to have foreseen . . . and while it is true that the subsequent act of the brother in attempting to extinguish the bulrush by beating it on the ground actually touched off the gasoline in the can, really causing the accident, it was the negligence of the plaintiff that started the train of events which caused his injuries, after the two boys had the can of gasoline in the lane, and had got the bulrush and the matches, and, therefore, his negligence contributed materially to the accident."

With the greatest respect, I cannot agree with the learned trial judge in this finding. I do not think that the learned trial judge has applied the proper principles in finding the infant plaintiff guilty of contributory negligence. I am of the opinion that it is inconsistent with the finding that Black was negligent in supplying the gasoline to the infant plaintiff and his brother. If the infant plaintiff was a person who could be reasonably responsible for the use of gasoline, not only by himself but in company with his younger brother, there would have been no liability on the defendant. If, on the other hand, it was negligence on the part of the defendant to put gasoline in the hands of the two boys under the circumstances found by the learned trial judge, it cannot be an answer to say that the boys used the gasoline for a dangerous purpose under those circumstances and did thereby cause injury to one of them.

Lord Denman C.J. in *Lynch v. Nurdin* (1841), 1 Q.B. 29 at 38, 113 E.R. 1041, deals with the principle that, in my opinion, should be applied to this case:

"But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault. The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blameable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shewn these qualities in as great a degree as he could be expected to possess them. His

misconduct bears no proportion to that of the defendant which produced it."

In considering whether the infant plaintiff's act in lighting the bulrush was negligence on his part, all the circumstances surrounding the accident must be taken into account. These include the infant plaintiff's knowledge of gasoline as an inflammable and dangerous substance, his capacity to understand the peculiar characteristics of gasoline, and the likely reactions of the younger boy in whose hands the bulrush was when lighted, the capacity of the infant plaintiff to curb and control those natural mischievous tendencies in a boy of nine years of age, and his ability to act with prudence when "dared" to a course of action by an older boy.

In *Cooke v. Midland Great Western Railway of Ireland*, *supra*, Lord Atkinson says at p. 237:

"The authorities from *Lynch v. Nurdin* downwards establish, it would appear to me, first, that every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are likely to meddle with whatever happens to come within their reach; . . . then the owners of those machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, or the injured person, in any particular case, be a trespasser on the vehicle or machine at the moment the accident occurred."

I will assume that the infant plaintiff was an average bright boy, and that he had the limited knowledge in regard to gasoline indicated by the learned trial judge. There is no evidence to indicate that he knew that gasoline would flare up, that the fumes would be likely to ignite and cause the gasoline in the pail to burn, or that the younger boy would likely become terror-stricken and beat the flaming torch on the ground in the vicinity of the open gasoline can. If he had known all these things, it is highly unlikely that he would have lighted the torch while it was being held by the younger boy. It is one thing to hold that a boy of nine years of age is guilty of contributory negligence where the danger is obvious and apparent even to a child, as in highway traffic cases, but where the danger is not so obvious or

apparent, and the knowledge necessary for its apprehension cannot be imputed to the boy, it is another thing. This is especially true where there is, either in the substance put into the child's hands or in the condition of things to which he has access, something in the nature of a temptation or an allure-ment. If one gives to a child an explosive substance and the child, with a limited knowledge in respect of the likely effect of the explosion, is tempted to meddle with it to his injury, it cannot be said in answer to a claim on behalf of the child that he did meddle to his own injury, or that he was tempted to do that which a child of his years might be reasonably expected to do.

In arriving at my conclusion in respect to the liability of the defendant, I have not considered the application of The Gasoline Handling Act, R.S.O. 1937, c. 332, and the Regulations passed thereunder.

It is argued by counsel for the appellant that the following Regulation passed by Order-in-Council, which came into force on the 1st day of February 1937, imposed a statutory duty on the defendant to deliver the gasoline only in a metal container of a safety type which was filed as an exhibit at the trial:

"Portable containers in which Class I liquids are sold or delivered to the public shall be of an approved metal safety type and a label shall be attached by the vendor in each case on which shall be printed in bold type a warning that the contents are dangerous and should not be exposed to fire or flame and should not be used for cleaning purposes in any building, provided that this regulation shall not apply to,— . . .

"(b) the delivery in a metal container of gasoline required to refuel a motor vehicle to permit of its being moved."

Counsel for the plaintiffs argued that unless it is found that this gasoline was sold for the purpose of refueling a motor vehicle, the sale does not come within the exception, and the defendant's servant committed a breach of the Act by delivering the gasoline in a lard pail of the type described in the evidence. It was argued that if the metal safety type container had been used, it is difficult to see how this accident could have happened, as the container is kept automatically sealed at all times.

Counsel for the defendant submitted that this Regulation is *ultra vires*, and that there was no power under the Act, as it stood at the time the regulation was passed, conferring on the Lieutenant-Governor-in-Council the power to make a Regulation

of this character. A careful reading of The Gasoline Handling Act does not indicate that it was originally passed for the purpose of the protection of any part of the public. By 1938, c. 14, s. 2, the following clause was added to s. 12 of the Act, which empowers the Lieutenant-Governor-in-Council to make Regulations:

“(jj) prescribing the method, manner and equipment to be used in handling, storing, selling and disposing of gasoline, kerosene and distillate.”

The validity of the Regulation in question must be viewed in the light of the language of the Act as it stood prior to this amendment. I am of the opinion that s. 39 of the Regulations in question was not within the powers of the Lieutenant-Governor-in-Council at the time it was passed. The defendant, however, made the Regulations a rule of conduct governing the sale of gasoline by its employees, and as such they may be taken into consideration in deciding whether or not the defendant was negligent. Other than this, I would hold that they have no bearing on the case.

Having come to the conclusion that the finding of the learned trial judge as to contributory negligence cannot stand, it is necessary to consider whether the case should be sent back for a new trial or be disposed of by this Court. On the argument counsel for the defendant frankly stated to the Court that he did not ask for a new trial. His language was, “whatever the Court does, do not send it back for a new trial.”

I am of the opinion that this Court, acting under the principles outlined in *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253 at 258, can properly dispose of the action. There is very little conflict in the evidence necessary to a decision. It is true that the learned trial judge had an opportunity of seeing the infant plaintiff, but this was four years after the accident happened. In my opinion the appearance of a boy at thirteen years of age could be of little assistance in determining whether he could be guilty of contributory negligence in these circumstances at nine years of age.

Counsel for the plaintiffs submits that the damages suffered by the infant plaintiff were assessed at too small an amount. Counsel for the defendant submits that it was too high. I cannot find any valid reason for interfering with the assessment of damages by the learned trial judge.

I would allow the plaintiffs' appeal, and dismiss the cross-appeal. Judgment should be entered for the infant plaintiff for \$8,000 and for the adult plaintiff for \$2,712.75, together with the costs of this appeal, including the costs of the former trial and appeal.

Appeal allowed; cross-appeal dismissed.

Solicitors for the plaintiffs, appellants: Bench, Keogh, Grass & Cavers, St. Catharines.

Solicitors for the defendant, respondent and cross-appellant: O'Meara and Burns, Kirkland Lake.

[COURT OF APPEAL.]

Cooper v. The Premier Trust Company.

Companies—Books—Inspection by Shareholders and Creditors—Duty of Company to Keep Books Available—What Constitutes Refusal—The Companies Act, 1934 (Dom.), c. 33, ss. 166, 169.

It is the clear duty of a company governed by the Dominion Companies Act to keep such books as are provided for by s. 166, and to have these books available for inspection "during reasonable business hours of every day, except Sundays and holidays", as required by s. 169. A shareholder's right of inspection is a right vested in him personally, to be exercised independently of the consent of the company. It is not something for which he must make arrangements with the company, although he may make better progress if he does so. *Holland v. Dickson* (1888), 37 Ch. D. 669; *Mutter v. Eastern and Midlands Railway Company* (1888), 38 Ch. D. 92, applied.

The plaintiff, a shareholder of defendant company, attended at the company's office and asked to inspect the share register and to make extracts therefrom. On her third such attendance, she was permitted to have the register for about one hour, at the end of which time it was taken from her on the ground that some transfers had come into the office, and must be recorded. It was then arranged that the plaintiff should telephone the Secretary of the company on the following Monday (the day then being Thursday), to arrange a time to continue her inspection. Within fifteen minutes, the plaintiff's solicitor telephoned the Secretary and told him that this arrangement was not satisfactory, and that the plaintiff would be at the office to continue her inspection at 10 a.m. on the Friday. The plaintiff duly attended at that time, but the Secretary refused to permit her to inspect the register then, giving as his sole reason the fact that an arrangement had been made for the following Monday. A writ was issued on the Friday, and the plaintiff did not again attend at the company's office.

Held, what took place on the Friday morning constituted a refusal to permit the plaintiff to inspect the register, and that refusal, in the circumstances, was unwarranted. The plaintiff was therefore entitled to a mandatory order requiring the company to make the register available for inspection during reasonable business hours of every day except Sundays and holidays. It was not an answer for the defendant to say in its pleading that it was willing to permit the inspection "at such reasonable times as would not interfere with its business", or "during reasonable business hours on any day at the reasonable convenience of both parties."

AN APPEAL by the plaintiff from the judgment of Hogg J. dismissing the action. The facts are fully stated in the reasons for judgment.

6th December 1944. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and ROACH JJ.A.

B. V. Elliot, for the plaintiff, appellant: The trial judge found that because of the agreement that the books would be made available the following week, there had been no refusal of inspection, or, if there had been a refusal, that the plaintiff had waived her right to insist. Section 169 of The Companies Act, 1934 (Dom.), c. 33, says that the books "shall, during reasonable business hours", etc., be kept open for inspection. This provision is imperative: The Interpretation Act, R.S.C. 1927, c. 1, s. 37(24); *In re Burton and Blinkhorn* (1903), 72 L.J.K.B. 752 at 753.

The trial judge has added to s. 169 words which are not there. [ROBERTSON C.J.O.: An absolutely literal interpretation can hardly be given to the section. The book must sometimes be used for other purposes.] "During reasonable business hours" leaves some latitude. Where a company has business hours only from 9.30 to 4.30, the share register should be available at any time during those hours, subject, of course, to legitimate use by the company itself.

The trial judge has found that there was an agreement binding on the plaintiff. The evidence does not bear this out. [ROBERTSON C.J.O.: What you mean is that there was no abandonment of the right to return on the following day?] Yes, the company claims that we are entitled to inspect only at its "reasonable convenience". If that were the law, a company might put a shareholder to great inconvenience.

The copying of the complete list of shareholders is within the words "inspect and make extracts": *Mutter v. Eastern and Midlands Railway Company* (1888), 38 Ch. D. 92, 57 L.J. Ch. 615 at 617.

[ROBERTSON C.J.O.: Do you suggest any lack of *bona fides* in the company?] The facts show that there was a complete lack of *bona fides*, but that is not necessary to our case.

Even if there was no refusal to permit an inspection on the 11th, 12th or 13th, there was on the 14th, and that refusal entitled us to ask for a mandatory order. [ROBERTSON C.J.O.:

Can the refusal on the Friday be considered apart from the other circumstances? By that time, the Secretary knew that the plaintiff wished to copy the entire list of shareholders.] Yes, that refusal can be considered alone. A "putting off" is equivalent to a refusal: *Merritt v. The Copper Crown Co.* (1903), 36 N.S.R. 383 at 389-90.

Our motive is wholly immaterial: *Mutter v. Eastern and Midlands Railway Company*, *supra*; Palmer's Company Law, 17th ed., 1942, p. 108; Masten and Fraser, Company Law of Canada, 4th ed., 1941, p. 658; *Davies v. Gas Light and Coke Company*, [1909] 1 Ch. 248, 708. So is the fact that the plaintiff was an employee of her solicitors: *Shepley v. Hurd et al.* (1879), 3 O.A.R. 549 at 551.

[ROACH J.A.: As of the date of the writ, you had been told that you could see the book on the following Monday, and that offer had not been withdrawn, but you did not wait for the Monday, but proceeded with your action on the Friday.] If what happened on Friday constituted a refusal, as we contend, we were entitled to sue at once. If we were not permitted to see the book, as we were entitled to do, on the Friday, our cause of action was complete. [ROBERTSON C.J.O.: Can it be said that there was a refusal on the Friday, without evidence of an intention or desire to impede you?] Section 169 requires that the book shall be available at some time on *every* business day.

We rely also on *Clawson v. Clayton et al.* (1908), 93 Pac. 729 at 731.

J. S. McKinnon, for the defendant, respondent: We rely on the judgment of Hogg J., and on his reasons. If the appellant's argument prevails, it will mean that every company must keep one employee available at all times to produce the share register for inspection.

B. V. Elliot did not reply.

Cur. adv. vult.

19th December 1944. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—An appeal by the plaintiff in the action from the judgment of Hogg J., dated 14th September 1944, after the trial of the action before him, without a jury, at Toronto.

The action, in brief, was for a mandatory order that the defendant (the present respondent) keep open its share register

for the plaintiff's inspection, at its head office, during reasonable business hours of every day except Sundays and holidays, and permit the plaintiff to make extracts therefrom. The action was dismissed, with costs.

The respondent is a company incorporated by special Act of the Parliament of Canada, (3-4 Geo. V, c. 179). By the Act of incorporation certain parts of the general Companies Act of Canada then in force were made applicable to the respondent, including two sections since carried into The Companies Act, 1934 (24-25 Geo. V, c. 33), and being ss. 166 and 169 thereof. These sections are as follows:

"166. The company shall cause a book or books to be kept by the secretary, or by some other officer specially charged with that duty, wherein shall be kept recorded

"(a) the names, alphabetically arranged, of all persons who are or have been shareholders;

"(b) the address and calling of every such person, while such shareholder;

"(c) the number of shares of each class held by each shareholder;

"(d) the amounts paid in, and remaining unpaid, respectively, on the shares of each shareholder;

"(e) all transfers of shares in their order as presented to the company for entry, with the date and other particulars of each transfer, and the date of the entry thereof; and

"(f) the names, addresses and callings of all persons who are or have been directors of the company, with the several dates at which each became or ceased to be such director."

"169. Such books shall, during reasonable business hours of every day, except Sundays and holidays, be kept open for the inspection of shareholders and creditors of the company, and their personal representatives, at the head office or chief place of business of the company, and every shareholder, creditor or personal representative may make extracts therefrom."

The appellant is the holder of 21 shares of the capital stock of the respondent, and has respondent's certificate, dated 21st March 1944, that she is such shareholder. On 11th April 1944 the appellant attended at the respondent's head office, and said to the respondent's Secretary that she would like to examine the respondent's share register. She produced to him her share certificate, and the Secretary asked her whether she could

identify herself as the shareholder in fact. He suggested her national registration card as a means of proving her identity. The appellant produced her national registration card, but, on inspection, it was observed that her name appeared thereon as Janet Deborah Cooper, while her share certificate bore the name Janet Cooper. The Secretary was not satisfied with this as identification, and the appellant went out, saying she would get something further.

The appellant returned the next day, 12th April, and brought with her means of identification satisfactory to the respondent's Secretary. He did not, however, permit her to inspect the share register on that day, but suggested that she come at three o'clock on the next day. The appellant duly appeared at 3 p.m. on 13th April—a Thursday—and the share register was made available to her. She was accommodated with a chair at the Secretary's desk, and proceeded, for about one hour, with the copying of extracts from the register. She was then interrupted by the Secretary, who asked whether she would be much longer, to which she replied that she would like to make a full list of shareholders, and had not nearly finished, having only got as far as the letter "B" or "C". The Secretary informed her that certain transfers of shares had come in, and that he would like to record them, and the appellant asked whether she could arrange another time. The following Monday was arranged between them, for her to proceed with her inspection, and she was to telephone the Secretary on that morning, and agree upon a time mutually convenient.

The appellant thereupon left respondent's office, it being then about 4 p.m. At 4.15 p.m. respondent's Secretary was informed by telephone, by a member of the firm who are the appellant's solicitors herein, and in whose office the appellant is employed, that he was not satisfied to have the inspection of the register continue on the following Monday, and that the appellant would attend at respondent's head office at 10 a.m. on the following day—Friday, 14th April—and that if the register was not made available then, a writ would be issued at once. A letter was also sent on the same afternoon by the appellant's solicitors to the respondent, but although tendered in evidence for the appellant, the learned trial judge, on objection by respondent's counsel, refused to admit it.

On Friday, 14th April, the appellant, accordingly, again attended at respondent's head office at 10 a.m., and asked to inspect the share register. She was not permitted to do so, the Secretary giving her as the reason that he thought they had arranged to make the register available to her on the following Monday, and that that was mutually satisfactory to them.

The writ of summons in this action was issued on the same day, and appellant's action must, therefore, be founded upon what had occurred to this time. She did not go to the respondent's head office on the following Monday, nor did she again communicate with respondent's Secretary to say that she wanted to see the share register.

Before proceeding to discuss the result of the facts in evidence, I should add that the transfers of shares, for the entry of which appellant's inspection of the register was interrupted by the Secretary on 13th April, were, in one case, a transfer from Thomas B. Holmes, the respondent's general manager, to Thomas B. Holmes in trust, and in another, a transfer to the Secretary himself. We are asked by the appellant to infer that the presentation of these transfers at this time for entry in the register was part of a scheme of the company's officers to prevent, hinder or delay the inspection of the register by the appellant. This will have to be considered with the other facts in evidence, but it will be well first to consider the legal relations of the parties in respect of the keeping and inspection of the share register.

It would seem to be a clear duty owed by the company to its shareholders to keep such book or books as s. 166 provides for. It would appear to be equally the clear duty of the company "during reasonable business hours of every day, except Sundays and holidays" to keep such books "open for the inspection of shareholders and creditors of the company, and their personal representatives, at its head office or chief place of business, and to permit every shareholder, creditor or other personal representative to make extracts therefrom." There is not much to be found in the way of reported decisions upon these provisions of the Companies Act of Canada, nor upon more or less similar provisions in the Companies Acts of the Provinces. There are, however, a number of reported decisions in England upon comparable provisions there, and a reference to some of these decisions will indicate how such provisions have been regarded

judicially, and the importance that has been given to their enforcement.

In *Holland v. Dickson* (1888), 37 Ch. D. 669, the motion was by the holder of stock and debentures, for an interim injunction to restrain the company and its directors from impeding the plaintiff in the exercise of his statutory right to inspect and take copies from the company's register. The company had assented to the plaintiff's request to inspect its registers so far as they related to his own stock, and permitted him to ascertain the names of the shareholders, but declined to permit him to ascertain the amount of their holdings. Further, in argument, it was contended for the company that before being entitled to inspect the register, the plaintiff was bound to state his reasons for desiring inspection. It was held that there was nothing in the provisions of the statute which supported the company's contentions, and that it had no right to require the plaintiff to state his reasons for inspection, when the statute contained no such stipulation, nor had it the right to refuse inspection of a part when the statute spoke of inspection of the whole.

In another case in the same year, *Mutter v. Eastern and Midlands Railway Company* (1888), 38 Ch. D. 92, 57 L.J. Ch. 615, the questions principally in issue were as to the status of the plaintiff, who sought an injunction to restrain the company from preventing his access to the register, and taking extracts therefrom, and as to the right to take copies and extracts. In dealing with the objection that the plaintiff had bought stock, not in his own interest but in that of some other person, Chitty J. said that the company could look only at the register and could not go behind it, and that the Court could not refuse to accord to the shareholder rights which the legislature had given him. He continued: "the object of the Act of Parliament was plainly this, that every shareholder should be able to see not merely the register so far as it related to himself, but to see it with reference to those who also stand upon the register with him—and the object, I take it, was that he might, if he thought fit, have communications with them. Unquestionably, as a matter of fact, directors of a company are not disposed to allow stockholders too much inspection, when it comes to a question that is going to be decided at one of the general meetings. The directors have the advantage of being able themselves, or by their

officers, to refer to the register and send out circulars to canvas all the stockholders, and I think this section was intended to put the stockholder in a similar position, that each stockholder might see who were entitled to the stocks of which he had a part, and what interest they had."

In the course of a judgment dismissing an appeal from the order granting an injunction in the foregoing case, Lindley L.J. said: "When the right to inspect and take a copy is expressly conferred by statute the limit of the right depends on the true construction of the statute." Later in his judgment he said: "... it is obvious that a shareholder or debenture stockholder may desire to consult the whole of the debenture stockholders on some matter which concerns them all, and it is reasonable to suppose that the right to inspect the debenture stock register is conferred to enable him to do this as well as for other purposes."

This case was followed in *Nelson v. Anglo-American Land Mortgage Agency Company*, [1897] 1 Ch. 130. See also *Boord v. African Consolidated Land and Trading Company*, [1897] W.N. 174.

Having regard to the terms of s. 169 of The Companies Act, already quoted, there is no room for doubting the right of the appellant "during reasonable business hours of every day except Sundays and holidays" to inspect the share register of the respondent. She sought to exercise her right to inspect the register at the respondent's head office, where the register is kept, at 10 o'clock on Friday, 14th April 1944, in accordance with notice given by telephone to the respondent's Secretary on the preceding afternoon. She was not permitted to inspect the register on that day, and the reason given for refusing permission to inspect on that day was that she and the company's Secretary had arranged to make the register available to her on the following Monday. It was not, and is not, alleged that any other ground existed for refusing inspection on 14th April. Respondent's Secretary was the only witness called. He did not say at the time of the refusal, nor did he say in his evidence, that the register was otherwise in use when the appellant came, or was expected to be in use, or that any inconvenience whatsoever or disturbance of respondent's business would have been occasioned by permitting appellant the inspection she requested.

In my opinion what occurred on Friday, 14th April, was a refusal of inspection, and that refusal was unwarranted. The right of inspection that a shareholder has is a right vested in him personally, to be exercised independently of the consent of the company. It is not something for which it is necessary that he should make arrangements with the company. It may well be that he will make better progress if he does so, and I confess that on the argument I was doubtful whether the appellant had not been too precipitate here. Upon reflection, however, I am of the opinion that the appellant was entitled, if so advised, to put her right of inspection to the test by a demand to inspect on the Friday. While it is not necessary, nor perhaps right, to conclude that the respondent was designedly putting the appellant off from time to time, yet it was obvious to her legal advisers that unless they did something about it, she would have only one hour's inspection in five days. Appellant's solicitor may have been wise to put an end to nice courtesies, and to assert his client's rights. The propriety of so doing is supported by the position taken by the respondent in its statement of defence. In para. 6 the respondent denies preventing the appellant from inspecting the books it is required to keep open for its shareholders "at such reasonable times as would not interfere with its business." The words of the statute are "during reasonable business hours of every day except Sundays and holidays." Again, in para. 7 respondent states that the appellant may still "during reasonable business hours on any day at the reasonable convenience of both parties inspect the said books."

The understanding, such as it was, that existed between the appellant and the respondent's Secretary when she departed on the afternoon of 13th April, did not amount to a contract or a waiver by the appellant of any of her rights. The Secretary gave nothing and promised nothing. If the appellant telephoned him on Monday morning, they were to see what they could arrange. There was nothing in that to deprive the appellant of her statutory right to demand inspection of the register on the 14th, as she in fact did. The ground put forward on behalf of the respondent for refusing the appellant inspection on the 14th, was available to the respondent only so long as the appellant recognized it, and the respondent's Secretary had notice within fifteen minutes after the appellant's departure on the

13th, that she proposed to exercise her right of inspection on the 14th. I can see no answer to her claim.

I would allow the appeal and direct judgment to be entered for the appellant for the relief claimed, with costs of action and of the appeal.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Borden, Elliot, Sankey & Kelley, Toronto.

Solicitors for the defendant, respondent: McMaster, Montgomery, Fleury & Co., Toronto.

[COURT OF APPEAL.]

Stewart v. Canadian Pacific Railway Company.

Rutherford v. Canadian Pacific Railway Company.

Railways—Negligence—Protection at Level Crossings—Special Conditions Requiring Precautions Greater than Prescribed under The Railway Act, R.S.C. 1927, c. 170—What Must be Found to Justify Imposition of Greater Degree of Care.

In an action arising out of a collision between a motor truck and a train which was standing across a level crossing in a town, it was established that the railway had provided the protection prescribed for the crossing under The Railway Act, R.S.C. 1927, c. 170, but the plaintiffs' evidence was to the effect that there was a heavy fog which prevented the seeing of the protective devices (or of the train itself) until too late to avoid the accident. This evidence was contradicted by evidence called for the defendant. The jury, though invited to do so, made no express finding as to the existence of a fog, or, if it had existed, as to the extent of the reduction in visibility, but found that the railway had been negligent, giving the following particulars: "Improper protection of the crossing under existing weather conditions. We feel that if this crossing had been protected by visible sign such as a wig-wag with light or flashing light, that the accident could have been avoided." Judgment was entered for the plaintiffs, and the defendant appealed.

Held (LAIDLAW J.A. dissenting), there must be a new trial. In view of the conflicting evidence as to the fog, and having in mind the fundamental importance to the decision of having a definite determination of the conditions that existed, before attempting to decide the legal principle applicable, there should have been some question or questions to the jury that would have required them to make an express finding in regard to the matter. Without some such express finding, it could not be determined whether the Court was dealing with a case in which exceptional circumstances existed, imposing on the railway a duty at common law to take precautions over and above those prescribed under The Railway Act, as in such cases as *The Lake Erie and Detroit River Railway Company v. Barclay* (1900), 30 S.C.R. 360, and *Montreal Trust Co. v. Canadian Pacific Railway Co.* (1927), 61 O.L.R. 137. This judgment was not to be taken as an expression of any opinion upon the question whether or not a finding of exceptional conditions of fog would support a judgment based on negligence in regard to the protection of the crossing.

Per LAIDLAW J.A., dissenting: The action should be dismissed. The existence of a condition of nature such as fog, snow or rain did not *per se* increase the degree of care required of the railway, and the mere fact that the view of, or at, a crossing was obscured by such a condition did not, apart from other circumstances, put upon the company an obligation to take precautions or provide protection not required by statute or by the order of competent authorities. The jury, by their answer, had attempted to prescribe the protection which should have been provided by the railway at this crossing, and this was a departure from their proper functions, jurisdiction in this respect having been vested exclusively in the Transport Board. *The Grand Trunk Railway Company of Canada v. McKay* (1903), 34 S.C.R. 81, applied. The only finding which could reasonably be made on the evidence was that the negligence of the truck driver was the sole cause of the collision and resulting damage. *Ristow v. Wetstein et al.*, [1934] S.C.R. 128 at 132; *Baker v. E. Longhurst & Sons, Ltd.* (1932), 102 L.J.K.B. 573, applied.

AN APPEAL by the defendant from the judgments of Urquhart J., [1944] O.W.N. 331, 57 C.R.T.C. 137, entered upon the findings of a jury. The facts are fully stated in the reasons for judgment.

27th November 1944. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and MCRUER JJ.A.

J. Q. Maunsell, K.C. (*Frank D. Turville* with him), for the defendant, appellant: The negligence of the appellant as found by the jury is not actionable negligence: *Raphael et al. v. The Governor and Company of The Bank of England* (1855), 17 C.B. 161 at 172, 139 E.R. 1030; *Herron v. Toronto R.W. Co.* (1913), 28 O.L.R. 59, 15 C.R.C. 373, 11 D.L.R. 697; *Jaroshinsky v. Grand Trunk R.W. Co.* (1916), 37 O.L.R. 111, 31 D.L.R. 531. The weather conditions referred to by the jury did not impose upon the appellant the obligation of exercising precautions for the benefit of the respondents in addition to those prescribed by The Railway Act, R.S.C. 1927, c. 170, ss. 257, 267 and 404. [ROBERTSON C.J.O.: It was no part of the jury's duty to prescribe what additional protection was required.] The jury have no right to find what protection should have been placed there: *The Grand Trunk Railway Company of Canada v. McKay* (1903), 34 S.C.R. 81, 3 C.R.C. 52. [LAIDLAW J.A.: There is other evidence on which the jury might find the respondent could not see the obstacle until he was on top of it, but there is no evidence of any circumstances which impose additional duty above that provided for by the statute.] Fog, rain, or snow is a normal condition unless accompanied by something exceptional. There is no additional duty upon the railway in such circumstances. Even if this contention should be held to be wrong, the respondent must show that knowledge of any

exceptional danger was brought home to us, and it was not. It is the responsibility of the respondent to show that the appellant knew that an accident might occur if special care was not observed: *Hendrie v. Grand Trunk Railway Co.* (1921), 51 O.L.R. 191 at 196, 29 C.R.C. 72, 67 D.L.R. 165. [LAIDLAW J.A.: The question in that case was whether or not a whistle should have been blown at a certain time.] The trial judge referred to *Anderson v. Canadian National Railway Company*, [1944] O.R. 169, 56 C.R.T.C. 379, [1944] 2 D.L.R. 209, but there the exceptional circumstances do not include weather conditions by themselves alone. At common law, without evidence of abnormal conditions, there would be no obligation upon the appellant to take precautions other than those already employed. The jury's verdict against the appellant cannot stand because of our lack of knowledge. The jury should have found the whole cause of the accident was the driving of the respondent Rutherford: *Ristow v. Wetstein et al.*, [1934] S.C.R. 128 at 132, [1934] 1 D.L.R. 787.

H. A. O'Donnell, K.C., for the plaintiffs, respondents: We rely on *Anderson v. Canadian National Railway Company*, [1944] O.R. 169, 56 C.R.T.C. 379, [1944] 2 D.L.R. 209. The case at bar is an exceptional one and it comes within the principles set forth in the *Anderson* case. Everything revolved about a question of fog and existing weather conditions at the time of the accident. The appellant was negligent in its failure to adopt measures for the protection of those using the railway crossing, in view of the exceptional circumstances which rendered ineffective or inefficient the precautions or warnings prescribed by statute. We are not asking the Court to lay down general rules on this subject, but with reference to this particular crossing at this particular time, and the facilities available to the appellant for making it safe, the appellant failed to do so when exceptional circumstances existed. The jury have made a finding of negligence in law, which should be given the fullest effect, and the principles of *Anderson v. Canadian National Railway*, *supra*, should be applied.

J. Q. Maunsell, K.C., in reply.

Cur. adv. vult.

28th December 1944. ROBERTSON C.J.O.:—These appeals are from the judgments of Urquhart J., after the trial of the

actions together before him, with a jury, at Perth. The appeals are by the defendants in the actions. In the Stewart action the plaintiff was awarded \$2,000 damages and costs, and in the Rutherford action the plaintiff was awarded \$2,250 damages and costs.

The actions were for personal injuries received by the respective plaintiffs when a truck in which they were riding ran into a standing freight train of the defendant, in the town of Carleton Place, at a point where provincial highway no. 15 is crossed by the railway line.

The accident occurred shortly after midnight of 30th November 1942. The respondents had come from Ottawa on their way to Perth, and had to pass through Carleton Place, which is about 35 miles from Ottawa. They claim that there was heavy fog, "so dense in front of you that you could not see". The surface of the road, they say, was icy. Rutherford was the driver and owner of the truck, and was familiar with the road, and knew of the railway crossing. At the crossing, in addition to the usual railway crossing signs required by The Railway Act, R.S.C. 1927, c. 170, the railway had erected a standard, which carried a bell, and above the bell there was a light. It is not disputed that the bell was ringing and that the light was burning. Rutherford did not hear the bell until he had hit the train, the windows of the truck being closed. He did not see the light, although he says he was looking for it, but he will not say that it was not burning. He saw the train when about fifty or sixty feet away from it, and his brakes were applied when he was at a distance of from thirty to forty or fifty feet away. Owing to the slippery surface of the highway, he says that he was unable to bring his car to a stop before it came into violent collision with the train. The respondent Stewart, in his evidence, corroborated the evidence of the respondent Rutherford, and there was other evidence supporting the respondents' story in some of its details.

On the other hand, there was evidence adduced by the appellant that there were no serious conditions of fog such as the respondent Rutherford and some other witnesses described. There was the evidence of a police constable, who was at the scene of the accident shortly after it occurred, and who said that the skid-marks of the respondent's truck, which he was easily able to identify, the truck being still in position by the

track, extended for a distance of 150 feet behind the truck as it stood. This witness was corroborated by the chief of police of Carleton Place. There was also evidence adduced by the appellant that the night was clear and cold, and that there was nothing wrong with the visibility. The appellant adduced further the evidence of Mr. Hastings, an automotive engineer, to the effect that the respondent's truck must have been travelling at a speed greatly in excess of the 12 or 15 miles an hour at which the respondents put the speed of the truck when its brakes were first applied, upon their seeing the train.

The questions put to the jury, and their answers, are the following:

"1. Has the plaintiff Rutherford satisfied you that there was no negligence or improper conduct on his part which caused or contributed to the collision in question? Ans. 'yes' or 'no'. A.—No.

"2. Were the damages sustained by the plaintiffs caused or contributed to by the negligence of the defendant, its servants or agents? Ans. 'yes' or 'no'. A.—Yes.

"3. If your answer to question No. 2 is 'Yes', of what did that negligence consist? Answer fully.

"A.—Improper protection of the crossing under existing weather conditions. We feel that if this crossing had been protected by visible sign such as a wig-wag with light or flashing light, that the accident could have been avoided.

"4. If your answer to question No. 1 is 'No' and question No. 2 is 'Yes', state the degree of fault on the part of—

"(a) The defendant or their servants or agents—A. 50%.

"(b) The plaintiff Rutherford—A. 50%.

"5. Regardless of who you think is responsible for the collision or in what degree the parties are in fault, at what amount do you assess the *total* damages arising from the collision and sustained by

"(a) The plaintiff Rutherford—\$4500.

"(b) The plaintiff Stewart—\$4000."

The jury made no express finding upon either the question of fog or the question of the speed of the truck. The evidence of the respondents is clear that the brakes of the truck were applied when the standing train came in view. If, therefore, the evidence tendered for the appellant, with respect to the skid-marks of the truck, is accepted, the train was seen by

the respondents when they were about 150 feet away. This would be definitely in conflict with the respondents' evidence as to the density of the fog prevailing, and might reasonably be considered by a jury to conflict with the evidence of the respondents as to the speed at which the truck was travelling.

In his charge to the jury the learned trial judge said:

"You have to find if there was fog . . . did it reduce the visibility to such an extent to make it dangerous, and did that impose upon the railway the duty to take care by putting out an extra man on each side of the train, as it would have to be, to give the utmost protection and particularly on the side in question? If your answer to question 3 is along those lines, that is, if you find your answer is 'Yes' to question No. 2, and your answer to question 3 is along those lines, I would like you to say if there was fog, how much fog there was, and whether it cut down visibility. I would like you, if you can, to state how much."

For the appellant it is contended that the jury's answer to question 3 is, in effect, a finding that there was improper protection of the crossing under the weather conditions that existed, in that there was no visible sign of the presence of the crossing, such as a wig-wag with light, or flashing light. I am not convinced that this is the proper interpretation of the jury's answer. In my opinion it is at least as reasonable to read separately the two sentences of which the answer is composed. The first sentence constitutes a finding of improper protection under the existing weather conditions. The second sentence is a mere statement by the jury as to the manner in which the crossing might be properly protected. Counsel for the appellant contended further that the jury, by its answer to question 3, read as he construes it, has, in effect, trespassed upon the functions of the Transport Board. He argues, first, that the answer, read in the sense in which he construes it, is a finding by the jury that the crossing was improperly protected because it was without such a visible sign as a wig-wag, with light, the jurisdiction to prescribe what will constitute proper protection at the crossing being vested exclusively in the Board. I am unable to accept that contention for the short reason that I do not think it proper to place the construction upon the answer that counsel does. It is, however, argued more broadly for the appellant that weather conditions in themselves do not call for further pro-

tection at its highway crossings by the railway, there having already been provided at least all the protection required either by statute or by order of the Transport Board. Appellant's counsel contends that that result necessarily follows from the decision of the Supreme Court of Canada in *The Grand Trunk Railway Company of Canada v. McKay* (1903), 34 S.C.R. 81, 3 C.R.C. 52.

There have been other cases, however, that indicate that there may be conditions at a railway crossing that impose a common law liability upon the railway for failure to supply adequate protection, even when all statutory requirements and orders of the Transport Board in regard to protection of the crossing have been fully complied with. I need, perhaps, refer to only two of these decisions. There is the case of *The Lake Erie and Detroit River Railway Company v. Barclay* (1900), 30 S.C.R. 360, where, because of the peculiarly dangerous character of its operations at the time, it was held that the railway was negligent in not taking special precautions suited to the occasion, to warn travellers at the crossing. In *Montreal Trust Co. v. Canadian Pacific Railway Co.*, 61 O.L.R. 137, 33 C.R.C. 407, [1927] 4 D.L.R. 373, cars of a standing freight train on a side track were in such a position that they obstructed a view of a passenger train, as it came to the crossing, by anyone approaching the crossing from that side. It was held that, under these special conditions, the railway was liable at common law for negligence in not having taken some extra precaution suited to the circumstances, to warn persons lawfully on the highway at the crossing.

It is true that in both the cases that I have referred to the special conditions, that called for extra precaution by the railway, were brought about by the act or operation of the railway company itself. On principle, however, it may well be that the special conditions, the existence of which renders the protection that the railway company has provided at the crossing under statutory requirement or order of the Transport Board inadequate or ineffective, and which create a duty at common law to provide extra protection, are not to be confined to conditions brought about by the railway company itself. I appreciate the importance of the principle of *Grand Trunk Railway v. McKay*, *supra*, and the necessity of having some well-defined rule of general application with respect to the protection to be pro-

vided at highway crossings. This is important, not only so that the railway company may know what its duty is, but also so that the public generally will know what signs to look for as indicating that the highway is crossed by a railway. It is, however, going beyond anything necessary to the decision in the *McKay* case to say that there may not be a common law duty upon the railway company to provide further protection at a crossing when reasonably necessary, on account of special conditions that have created unusual danger, or have made the stipulated protection inadequate or of no effect. The *Barclay* case and the *Montreal Trust Co.* case, that I have cited, illustrate the proposition that notwithstanding the decision in the *McKay* case, there may still be cast upon the railway company by special conditions a common law duty to furnish protection at a highway crossing beyond that required at the crossing under ordinary conditions, but neither of these cases has decided the limits of these exceptional or special circumstances. Each is a decision upon its own facts and goes no further.

While I am not prepared to say that some limitation upon the common law liability of the railway company, such as appellant's counsel contends for, may not properly be held to exist, I am of the opinion that in view of the general importance of the principle involved, we should not decide as a matter of law until it becomes necessary to do so, that such an exceptional condition as a fog of the character described by the respondents in their evidence, may not impose upon the railway company a common law duty to provide reasonable protection beyond that required under ordinary conditions, when, under such exceptional conditions, the railway company places a freight train across an important highway and allows it to stand there.

In view of the conflicting evidence in this case as to whether there was any fog at all, and, if any, as to its density, and having in mind the fundamental importance to the decision of this case of having the conditions that existed definitely determined before attempting to decide the legal principle to be applied, the trial judge, in my opinion, should have included in the questions submitted to the jury some such question or questions as would have required the jury to make an express finding in regard to the matter. Without some such express finding, it is impossible for this Court to know whether or not it is dealing with a case where exceptional circumstances existed. From the present

findings of the jury it is impossible to say that their finding of improper protection is not predicated upon ideas of their own as to the appellant's duty in regard to the protection of highway crossings, even when there are no exceptional circumstances. Equally, it is impossible to say, upon the present findings of the jury, that they did not prefer the evidence of the respondents as to the existing conditions, and therefore based their opinion that the protection of the crossing was improper, upon the view that there was present such a condition of fog that it was impossible to see the standing train in time to stop the truck, travelling at a reasonably low speed. I desire, however, to make it entirely plain that I am expressing no opinion for the present upon the question whether or not a finding by the jury of exceptional conditions of fog, such as the respondents say existed, would support a judgment for the respondents based on negligence of the appellant in regard to the protection of this crossing when a freight train was standing across it. This latter question, in my opinion, should be left to be decided when a jury has determined whether or not there were, in fact, such exceptional circumstances as the respondents have alleged.

I would, therefore, order a new trial in order that the questions of fact I have referred to, and any others that it may appear to the judge presiding at the new trial ought to be determined, may be submitted to the jury, so that he may have from the jury all the findings of fact necessary to enable him, and any other Court, to decide, and to apply, the proper principle of law. I think the appellant is entitled to its costs of the appeal. The costs of the former trial should be in the discretion of the judge before whom the new trial is had.

LAILAW J.A. (*dissenting*):—The appellant was defendant in two actions tried together with a jury before Urquhart J., and after findings of the jury judgment was given in favour of each plaintiff on 19th April 1944.

The pertinent facts are few. Robert Rutherford, one of the respondents, was driving his motor truck in a northerly direction on a highway in the town of Carleton Place, on the night of the 30th November 1942. He did not observe any warning of danger, and did not see a railway car on the tracks of a level crossing in front of him until it was too late to stop. His truck crashed into it and he sustained serious injuries and loss. The

respondent Stewart who was riding in the truck was also injured.

At the time of the accident there was a protective device at the railway crossing. It consisted of a post painted in black and white stripes. The post had cross arms bearing the words "Railway Crossing" and was topped by an electric bell, mounted in a box with a glass face. The glass had the word "Danger" printed on it in capital letters, illuminated at night time by an electric light placed inside the box. This device was about fourteen feet six inches high and situated approximately nineteen feet south of the railway tracks and four feet east of the east edge of the highway pavement.

The jury found that Rutherford (the driver of the truck) had not satisfied them that there was no negligence or improper conduct on his part which caused or contributed to the collision in question; also, that there was negligence of the defendant stated as follows:—"improper protection of the crossing under existing weather conditions. We feel that if this crossing had been protected by visible sign such as a wig-wag with light or flashing light, that the accident could have been avoided." The degree of fault was stated by the jury to be fifty per cent. on the part of the respondent Rutherford, fifty per cent. on the part of the appellant.

In accordance with a well-established rule, I read the allegations of negligence made by the plaintiffs, the evidence, and the charge to the jury, to ascertain the meaning of the jury's findings, and to give effect thereto, if possible. It is alleged that the defendant:

(a) "failed to provide adequate signs or warning of the existence of the railway crossing";

(b) "failed to have any agent, servant, or employee standing in a position on the highway to warn traffic thereon of the danger, having regard to all circumstances then and there existing";

(c) "permitted freight cars to stand on the highway for a longer period than that permitted by the Statute in that behalf";

(d) "failed to give any signal or warning to approaching traffic on the highway of the obstruction created having regard to the physical and atmospheric conditions, namely, the fog and mist and the slippery highway conditions then and there existing."

The foundation of the claims against the appellant is the assertion that the visibility at the crossing was reduced by fog. There was much evidence on this subject before the jury and the learned judge charged in part as follows: "I would like you to say if there was fog, how much fog there was, and whether it cut down visibility." It must be held that the jury considered the conflicting evidence and that they were unwilling to make a finding in favour of the plaintiffs. The facts relied upon by the plaintiffs were not proved to the satisfaction of the jury: *Andreas v. The Canadian Pacific Railway Company* (1905), 37 S.C.R. 1, 5 C.R.C. 450. But even if one with an excess of liberality interprets the words of the jury "under existing weather conditions" to include the conclusion that the visibility was cut down by a condition of fog at the crossing, nevertheless there is no evidence of any other circumstance sufficient in law to impose on the appellant a duty to exercise a degree of care over and above that imposed upon it under or by virtue of the provisions of The Railway Act, R.S.C. 1927, c. 170.

The existence of a condition of nature such as fog, snow or rain does not *per se* increase the degree of care required on the part of a railway in its operations. Likewise the mere fact that the view at, or of, a railway crossing is obscured by such a condition does not, apart from other circumstances, put upon a railway company an obligation to take precautions or provide protection not required by statute or by order of competent authorities. I do not say that a condition such as I mentioned cannot under any circumstances be taken into consideration by a Court or jury in measuring the care taken by a railway company. It is sufficient to say that in this case there was no exceptional or special circumstance shown by the evidence. Moreover, and in any event, there is no evidence that any employee of the appellant knew or ought to have known that any unusual condition existed at the crossing at the time of the accident.

What the jury has attempted to do is to find fault with the appellant because the crossing was not protected "by visible sign such as a wig-wag with light or flashing light". They say "if" this crossing had been so protected "the accident could have been avoided." It is abundantly plain to me that the absence of such a device as described by the jury constituted, in their opinion, "improper protection of the crossing under

existing weather conditions". It makes no difference whether one interprets the word "improper" as meaning "unsatisfactory" or "unfit", in criticism of the protective device in existence at the crossing, or as meaning that an additional warning device ought to have been provided. In either case the jury has exceeded its powers. It has, in the absence of special circumstances, attempted to determine "the character and extent of the protection which should be given to the public at places where the railway track crosses a highway at rail level": *The Grand Trunk Railway Company of Canada v. McKay* (1903), 34 S.C.R. 81 at 97, 3 C.R.C. 52. That power is vested exclusively in the Board of Transport Commissioners for Canada. The Railway Act, *supra*, ss. 257, 267, 287(g), 404.

There is no evidence whatever that the railway car into which the respondent Rutherford drove his motor vehicle was standing on the highway for a longer period of time than permitted by statute, or, indeed, for any appreciable time. The fact that the car was stationary was not in any way a factor contributing to the cause of the accident. The driver of the motor vehicle would have crashed his truck into it in the same manner if the train had been moving. Nor does it appear that the finding of the jury is dictated or influenced by any other consideration than weather conditions. It becomes obvious at once that under such circumstances the jury has sought to prescribe a duty on the part of the railway which is wholly unreasonable and impractical. If a railway were put under the obligation to protect all its level highway crossings by means of a "visible sign such as a wig-wag with light or flashing light" to guard against the increased danger caused solely by fog, sleet, rain, darkness or other condition of nature reducing the visibility of persons using the highways, the operation of its business of transportation would be made so onerous as to be almost impossible. It is inconceivable to me that, under the circumstances of this accident, a jury has power to find fault with a railway for not having provided special means of crossing protection.

The following cases relied upon by counsel for the respondents are distinguishable: *The Lake Erie and Detroit River Railway Company v. Barclay* (1900), 30 S.C.R. 360; *Imerson v. Nipissing Central Railway Co.*, 57 O.L.R. 588, [1925] 4 D.L.R. 504; *Montreal Trust Co. v. Canadian Pacific Railway Co.*, 61

O.L.R. 137, 33 C.R.C. 407, [1927] 4 D.L.R. 373. In all of them the liability of the railway is founded on a breach of duty arising under the common law by reason of the existence of exceptional circumstances. *Anderson v. Canadian National Railway Company*, [1944] O.R. 169, 56 C.R.T.C. 379, [1944] 2 D.L.R. 209, does not support the argument that a condition of fog at a railway crossing (even if proved to exist to such an extent as to reduce the visibility) is an exceptional circumstance imposing a special duty on the railway company.

At the close of the plaintiffs' case counsel for the defendant moved for a judgment of nonsuit. The learned judge reserved judgment on the motion and the defendant called evidence. At the end of all the evidence the motion was renewed, but the case was allowed to go to the jury. The appellant contends that the motion ought to have been granted and a judgment of nonsuit given notwithstanding the findings of the jury. The jury has, in effect, found that the respondent Rutherford was negligent and that his negligence was a cause of the accident to the extent of fifty per cent. We do not know, and the jury was not required to determine, what acts or omissions constituted that negligence. But an examination of his testimony shows that he did not realize his danger until he was about fifty or sixty feet from the crossing. At that place the warning device of light, bell and painted post would be only thirty or forty feet in front of him, and to his right hand side. No excuse for not observing the warning is suggested by him, except the condition of fog. But it must not be overlooked that this crossing was not a strange or unknown place to the driver of the motor vehicle. It was in the town of Carleton Place, and in answer to his own counsel to a question suggesting that he had "travelled the road a good deal", the driver stated he had been over it "several times". I can find no excuse under the circumstances for the failure of the respondent Rutherford to realize his danger in sufficient time to stop in a place of safety as he approached this railway crossing, and in my opinion there is no evidence upon which a jury could properly excuse his omission. When the driver apprehended danger he applied the brakes. He says that under existing road conditions he required "perhaps 100 feet" for stopping in an emergency. If he could not see the railway car until he was fifty or sixty feet away from it, he was driving at an excessive speed under the circumstances: *Ristow*

v. Wetstein et al., [1934] S.C.R. 128 at 132, [1934] 1 D.L.R. 787, quoting *Baker v. E. Longhurst & Sons, Ltd.* (1932), 102 L.J.K.B. 573. My view is that the only reasonable and judicial finding that could be made by the jury was that the negligence of the respondent Rutherford was the sole cause of the collision and resulting damage, and that there was no evidence at the conclusion of the whole case upon which a jury could properly find any negligence of the appellant. For this reason and also because the negligence of the defendant, as found by the jury, is not a good finding in law, as above discussed, the appeal ought to be allowed with costs: the judgments of the Court below in both actions ought to be set aside and the actions dismissed with costs.

MCRUER J.A. agrees with ROBERTSON C.J.O.

Appeal allowed and new trial ordered, LAIDLAW J.A.
dissenting in part.

Solicitor for the plaintiffs, respondents: H. A. O'Donnell, Perth.

Solicitor for the defendant, appellant: J. Q. Maunsell, Toronto.

[COURT OF APPEAL.]

Re Hornell.

Wills—Construction—Gift, Absolute in Form, Followed by Gift Over—Dominant Intention.

The will of a testator contained a gift to the testator's wife of "all my personal property, monies, real-estate and mortgages, to have and to hold after she pays all legal claims against my estate." The clause continued as follows: "On the death of my wife, what remains of my estate is to go to my daughter".

Held, by the majority of the Court, the dominant intention of the testator was that his wife should have an absolute estate in the property, and the last sentence of the clause was inoperative to cut down the absolute nature of the gift to the widow. The wording of the will did not warrant restricting the interest of the widow to a life estate. *Re Walker* (1925), 56 O.L.R. 517; *In re Freeman; Hope v. Freeman*, [1910] 1 Ch. 681 at 691, applied.

Per LAIDLAW J.A., dissenting: The testator's intention, ascertained by construing the will without reference to any rule of law, was clearly to benefit both his wife and his daughter. The will should therefore be read as conferring on the widow only a life estate (with power to encroach on the capital, if necessary), with remainder to the daughter. *Re Walker*, *supra*, distinguished; other authorities on construction reviewed.

AN APPEAL by Jean Winnifred Hornell and David Eric Hornell, from the judgment of Kelly J., [1944] O.W.N. 664, [1944] 4 D.L.R. 572, on the construction of a will. The facts are fully stated in the reasons for judgment.

7th, 8th and 13th December 1944. The appeal was heard by HENDERSON, LAIDLAW and MCRUER JJ.A.

Gordon N. Shaver, K.C., for Jean Winnifred Hornell, appellant: On a proper construction of the will, the appellant is entitled to the remainder of the estate after her mother's death. There are two arguments: First, the words of the will are so clear as to the intent of the testator that this Court should give effect to the gift over. Secondly, where there is a gift to A, subject to the payment of debts, and a gift over, then the rule of construction is that A takes only a life estate.

The dominant intention of the testator is to benefit his daughter upon the death of his wife, and effect should be given to that apparent intention. At most the widow took a life estate, or a life estate with power to encroach upon the corpus for her own maintenance and support. The case at bar is distinguishable from *Re Walker* (1925), 56 O.L.R. 517, and *Re Scott*, 58 O.L.R. 138, [1926] 1 D.L.R. 151. When one examines the words of the will itself, it is clear that effect should be given to the gift over, and the obvious intention of the testator should be fulfilled.

This testator meant his just claims to be paid, and thereafter the widow was "to have and to hold" the estate as a life tenant. [LAIDLAW J.A.: Do you find any words in the first gift which limit the gift to the mother?] There is a residue created by the terms of this will; see 34 Halsbury, 2nd ed., p. 339, para. 388. A different conclusion could be reached only by importing into the will words that are not presently there. [HENDERSON J.A.: There is no need for importing words if there is an absolute gift in the will. The words of this will have the same meaning as those in the will under discussion in *Re Walker, supra*.] There, Middleton J.A. sought to apply an established principle laid down in *Constable v. Bull* (1849), 3 De G. & Sm. 411, 64 E.R. 539, to a particular document. Each instrument should be construed only on its own language—not on similarities to others. [HENDERSON J.A.: A beneficiary is bound to pay the just debts of the estate. What difference should a direction to that effect make to the estate that she receives? Why should it be a life interest in one case and not in another?] If the Court adopts our interpretation, effect is given to every word in the will. The testator manifestly intended that the appellant should benefit, otherwise why insert her name in the will? [HENDERSON J.A.: All that he intended to give his daughter was what his widow did not spend.] There is no way in which this will may be read without giving to the daughter a gift. [LAIDLAW J.A.: It does seem obvious that the father intended to benefit his daughter. It would be unfortunate if a rule of law should defeat that intention.] Some meaning must be attributed to the words "after payment of debts". If there is an absolute gift to the widow in the first instance, then it is cut down by the later words. [MCRUER J.A.: You must find clear words showing that a gift over was intended.] Any layman would say that the father intended his daughter to obtain a benefit. [MCRUER J.A.: Would not anyone think that most of all the testator wanted his wife to have full use of the property?]

If the Court finds in the words "to have and to hold" an intention that the wife should have a life estate with power to encroach, then the Court would give effect to the gift over. There is no rule of construction which will prevent this Court from assisting the appellant in this case. [HENDERSON J.A.: Does any case say why a direction to pay debts changes the

gift to the wife in the will? To my mind, the point does not bear argument and the words are superfluous, meaning nothing.] The classical definition of residue is the estate after payment of debts. [MCRUER J.A.: Do you say that the widow took the estate in trust for the appellant, with power to encroach for her own maintenance, and she could not give anything out of the estate to the other children?] If *Constable v. Bull*, *supra*, is to be followed, the wife should hold without spending the residue of the estate. If *Constable v. Bull* is not followed, then she had a life interest with power of encroachment, and she may encroach as much as she likes. [LAIDLAW J.A.: If the wife obtained an absolute estate, then she was in a position to dispose of the estate by will.]

The appellant asks the Court to find that the dominant intention of the testator was to provide for his wife, and at her death, for his daughter. This interpretation would give effect to every word in the will: *Re Dixon*; *Dixon v. Dixon* (1912), 56 Sol. Jo. 445; *In re Cammell*; *The Public Trustee v. The Attorney-General* (1925), 69 Sol. Jo. 345; *Re Russell* (1885), 52 L.T. 559.

P. J. Bolsby, for David Eric Hornell, appellant: This will, properly construed, would give to the widow a life estate with a gift over to the appellant, that being the clear intention of the testator: *Re Johnson* (1912), 27 O.L.R. 472, 8 D.L.R. 746. An examination of the will as a whole leads to the inescapable conclusion that the widow took a life estate: *Re Cutter* (1916), 37 O.L.R. 42, 31 D.L.R. 382, where the language employed is very similar to that in the present case. There is no power contained in the will which permits the first taker to alienate or dispose of the property by will.

R. M. Willes Chitty, K.C., for Edith V. Sedgwick, respondent: A clause which clearly conveys an absolute estate can only be cut down to a lesser estate by a clause of equal clarity; in this instance, the first clause is unequivocal and the second clause is indefinite. The gift over is a gift merely after or on the termination of the donee's interest, and being merely a gift of what remains, is not a gift over in defeasance of the prior gift. *Constable v. Bull* (1849), 3 de G. & Sm. 411, 64 E.R. 539, upon which the appellant relies, was criticized in *Re Walker* (1925), 56 O.L.R. 517. This latter case was followed in *Re Scott*, 58

O.L.R. 138, [1926] 1 D.L.R. 151, and the wording of the Hornell will is extraordinarily similar to that in the *Scott* case, and it does not seem possible to distinguish it from the wording in the *Walker* case. *Constable v. Bull*, *supra*, is not an authority on this proposition at all. Here, the absolute gift is made subject to the limitation contained in the habendum attached to it, but that limitation is only a charge of legal claims, and this in no way alters the absolute gift. Nor can one construe the gift as a gift for life subject to a power to encroach on the corpus. The only word that might suggest this is the word "remains", and it would appear that that word is altogether too ambiguous to support such a construction in view of the absolute character of the words in the first sentence, creating the absolute gift to the wife.

Gordon N. Shaver, K.C., in reply: When the gift of an estate is subject to the payment of debts with clear words and a gift over, that is a classic residue in English law. *Constable v. Bull* (1849), 3 de G. and Sm. 411, 64 E.R. 539, and the cases following it, are then applicable. *Constable v. Bull* has been approved by the courts in England. It has been held many times that "what remains" is a definite gift. Here the words "to have and to hold" are not technical words. This is the language of a layman. The fundamental rule of construction of the language of a will is to have regard to the terms of the will. The meaning of the testator must be understood and given effect to.

P. J. Bolsby, in reply: A recent authority on construction is *Perrin et al. v. Morgan et al.*, [1943] A.C. 399. Whether the widow took an absolute estate is to be determined by the subsequent sentence of the will, properly construed.

Cur. adv. vult.

28th December 1944. HENDERSON J.A. agrees with MCRUER J.A.

LAIDLAW J.A. (*dissenting*):—The will of the late David Hornell contains the following provision:

"I give and bequeath to my wife Margaret Hornell all my personal property, monies, real-estate and mortgages, to have and to hold after she pays all legal claims against my estate. On the death of my wife, what remains of my estate is to go to my daughter, Jean Winnifred Hornell."

Upon an application made on behalf of Jean Winnifred Hornell for construction of the will, Kelly J. on 27th October 1944, held that Margaret Hornell, widow of the testator, took an absolute gift of the whole estate of the late David Hornell, and "that the attempted gift of what remained of the said estate on the death of the said widow is repugnant and void". Jean Winnifred Hornell now appeals from the judgment of Kelly J., and argument on behalf of David Eric Hornell, a son of the testator, was submitted to this Court by counsel in support of the appeal.

The first and cardinal duty of the Court in such a case as this is to ascertain the intention of the testator from the language used in the will and from such surrounding circumstances as may be properly considered.

There are certain rules of construction which I ought to adhere to, *viz.*: (1) To read the will "without paying any attention to legal rules": per Lord Davey in *Comiskey et al. v. Bowring-Hanbury et al.*, [1905] A.C. 84 at 89; see also *Pearks v. Moseley et al.* (1880), 5 App. Cas. 714; *Re Russell* (1885), 52 L.T. 559 at 560. (2) "... to have regard not only to the whole of the clause which is in question, but to the will as a whole which forms the context to the clause": per Lord Birkenhead L.C. in *Lucas-Tooth v. Lucas-Tooth et al.*, [1921] 1 A.C. 594 at 601; see also *J. Lewis & Sons, Limited v. Dawson*, [1934] S.C.R. 676 at 679, [1934] 4 D.L.R. 753. (3) To give effect, if possible, to all parts of the will: see 34 Halsbury, 2nd ed., p. 197, para. 252.

When I have thus found the intention of the testator, I inquire whether there is any rule of law which prevents effect being given to it. *Hodgson v. Ambrose et al.* (1780), 1 Dougl. 337 at 342, 99 E.R. 216.

I first consider certain circumstances under which this will was made. It was made by the testator's clergyman on 9th December 1939. The testator at that time was a retired postal carrier. He was about 73 years old and his wife about 76. They had three children, David Eric, Edith Victoria and Jean Winnifred.

David Eric, a son, was a salesman living in Ottawa. Edith Victoria, the respondent, was married (Edith Victoria Sedgwick) and living in the village of Minden. Jean Winnifred had lived at home with her parents all her lifetime and looked after

the family home for many years prior to the death of her father and mother. Her father died in 1940 and her mother died intestate in 1943.

In the light of these circumstances I read the whole will as a layman unfettered by rules of law, real or imaginary. I come to the irresistible conclusion that the testator intended by the words used in his will to benefit both his wife and his daughter Jean Winnifred. He meant that his widow should have an estate in his property for her use and enjoyment during her lifetime and that after that life estate the part of his property then unused by his widow should go to his daughter Jean Winnifred. That is the meaning from the natural, logical and common-sense point of view.

I agree that if one reads only the first sentence of the paragraph quoted it is capable of meaning that Margaret Hornell took in fee simple. But such a course is contrary to the proper principle that the will as a whole must be considered. Lord Birkenhead L.C., in *Lucas-Tooth v. Lucas-Tooth et al.*, *supra*, at p. 601, says: "Unless this is done, there is a grave danger that the canons of construction will be applied without due regard to the testator's intention, tending thereby to ascertain his wishes by rules which, in the particular case, may produce consequences contrary to that intention."

In my opinion the judgment of the learned judge in the court below proceeds on the error of reading the first clause alone, and in consequence he obtains a construction which is contrary to and defeats the intention of the testator. I quote from his judgment as follows: "Dealing, therefore, with the expressed gift in favour of Margaret Hornell, without reference to the gift to Jean Winnifred Hornell, it is evident that that gift standing alone was an absolute gift of all personal property, monies, real estate and mortgages after the legal claims against the estate had been paid. There is no doubt in my mind that Margaret Hornell would have absolute control of the gift to her, including the right of alienation and disposition of any part of that gift." But when the whole will is read, and not the first sentence only, it is my firm conviction that the testator did contemplate that part of his property would be available on the death of his wife. He did not contemplate that during her lifetime she would dispose of all of it by sale, gift, or other means so as to completely deprive his daughter Jean Winnifred

of all interest and benefit whatsoever. Likewise, from the language used, he did not expect his wife to make a will and thereby dispose of the estate given to her. So, what he was contemplating was that at the time of the death of his widow there would be in existence a part of his property unused by her and which he plainly indicated "is to go to my daughter, Jean Winnifred Hornell."

If the testator had intended to give to his wife a fee simple estate "it would have been very easy to have left out the words that appear subsequently to those first words in the will": per Lord James in *Comiskey v. Bowring-Hanbury*, *supra*, at p. 91. But as stated by that learned judge: "I do not think we can shut out those words from the construction of this will". I refer also to the words of Eldon L.C. in *Oddie v. Woodford et al.* (1821), 3 My. & Cr. 584 at 614, 40 E.R. 1052, as follows: "Now I take it to be one rule in the construction of a will, that you are not to impute to a testator, unless the context requires it, that he uses additional words except for some additional purpose; that you are not to suppose he uses additional words for no purpose."

The respondent's contention entirely ignores the gift over, or attempts to get rid of it by calling it repugnant. The Court cannot properly disregard a word in a will if meaning can be given to it, and "if that meaning is not contrary to some intention plainly expressed in other parts of the will": Halsbury's Laws of England, 2nd ed., vol. 34, p. 198. Much less has the Court any right in such a case to disregard all of a specific provision.

Upon argument of this appeal the Court was referred to a great many cases, which I have read with interest. But it has been made plain, and is fully appreciated by the Court and counsel, that the proper use of them is limited. They constitute authority as to rules of construction and rules of law, but the construction put by a Court on words in one will is not authority binding the Court to adopt the same or similar construction on words of another will. Two minds may fairly differ on the interpretation to be placed on language which appears to be similar or identical. I am bound, however, to follow established principles of law, whenever they are properly applicable to the facts and circumstances of a particular case. The construction

I put on the words of the will under consideration does not give rise to the application of any rule of law, and accomplishes a result which does justice. Any other construction, I think, defeats or impairs the real intention of the testator by the application of technical rules unknown and unsuspected by him or the author of the will. Thus, as mentioned above, consequences are produced contrary to that intention, and injustice is done.

Respondent's counsel refers in particular to *Re Walker* (1925), 56 O.L.R. 517. It was there held that from the words used in the will the testator intended his wife to have all the rights incident to ownership of property and a gift over at her death was an attempt by the testator to do that which is impossible. It was made plain that the attempted gift over was, in the opinion of the Court, repugnant to the prior gift to the testator's wife, and consequently was void. The language used in the will showed a testamentary intention in favour of the wife which prevailed over the subordinate intention indicated by the words used in making the gift over. The subordinate intention, being repugnant to the dominant intention, was necessarily rejected. It is, of course, well settled that a gift absolute makes any subsequent attempt by the donor to deal with the subject of the gift of no effect whatever. But in my opinion the words used in the will of David Hornell to express his intention show that the gift to his wife is fixed in character by the subsequent words making provision out of the same property for his daughter. The intention as found in the words used in the latter clause dominates the intention disclosed in the words of gift to the testator's wife in the first clause. I think that the gift over prevails and the gift in favour of the wife is subordinate to it. This view does not in any way conflict with the decision in *Re Walker*, but applies the principles therein discussed to the language of the will now before the Court.

I do not discuss any of the other numerous cases referred to in argument. It is sufficient to say that my decision is in accord with the principles I have discussed, and depends, as it ought to, on the authority of the particular words used in the will in question.

My conclusion is that the appeal ought to be allowed and the declaration in the judgment of the Court below set aside. In lieu thereof it ought to be declared that Margaret Hornell

took a life estate with power, for the purpose of her maintenance, to encroach on the capital of the property of the late David Hornell, and upon her death Jean Winnifred Hornell took an estate in fee simple in the part of the property then remaining.

I would allow the costs of all parties in this court out of the estate to which Jean Winnifred Hornell is entitled. I do not alter the order of Kelly J. as to the costs of the proceedings before him.

MCRUER J.A.:—This is an appeal from the judgment of the Honourable Mr. Justice Kelly, construing the will of David Hornell, deceased. The appellants are Jean Winnifred Hornell and David Eric Hornell, daughter and son respectively of the late David Hornell and his wife the late Margaret Hornell. The respondent Edith Victoria Sedgwick is also a daughter of David and Margaret Hornell.

David Hornell died on the 25th June 1940, and Margaret Hornell died on the 9th September 1943, intestate, leaving the appellants and the respondent her only heir and heiresses-at-law and next-of-kin.

The testator's will was drawn by a clergyman and the clause in question reads as follows:

"I give and bequeath to my wife Margaret Hornell all my personal property, monies, real-estate and mortgages, to have and to hold after she pays all legal claims against my estate. On the death of my wife, what remains of my estate is to go to my daughter, Jean Winnifred Hornell."

The principles to be applied in construing a will are laid down in numerous cases. For the purpose of the case in appeal the language of Buckley L.J. in *In re Freeman; Hope v. Freeman*, [1910] 1 Ch. 681 at 691, is applicable:

"The first principle is that which every Court of construction has to apply in every will case which comes before it. That is that it is the duty of the Court of construction to read the language of the testator and to ascertain his intention from the words he has used. On the one hand the Court must not vary his language, on the other hand it must not tie itself so strictly down to the literal meaning of the words as to give the go-by to the intention which is to be found expressed in the words. The second principle is that a clear gift in a will is not

to be cut down by anything subsequent which does not with reasonable certainty indicate the intention of the testator to cut it down."

My view is that the intention of the testator, gathered from the language used, is that he wished his wife Margaret Hornell to have all his property absolutely, but if anything remained of the property given to her at her death, it should go to his daughter Jean Winnifred Hornell.

In *Re Walker* (1925), 56 O.L.R. 517 at 522, Middleton J.A. states:

"When a testator gives property to one, intending him to have all the rights incident to ownership, and adds to this a gift over of that which remains in specie at his death or at the death of that person, he is endeavouring to do that which is impossible. His intention is plain but it cannot be given effect to. The Court has then to endeavour to give such effect to the wishes of the testator as is legally possible, by ascertaining which part of the testamentary intention predominates and by giving effect to it, rejecting the subordinate intention as being repugnant to the dominant intention."

After carefully considering the arguments advanced by counsel for the appellants, I feel that I am bound to hold, on the authorities, that the words used by the testator showed a dominant intention in favour of Margaret Hornell, and that the last sentence of the clause is inoperative to cut down the absolute nature of the gift to Margaret Hornell.

Counsel for the appellant argued that the words "to have and to hold after she pays all legal claims against my estate", when read with the words "On the death of my wife, what remains of my estate", indicated an intention to restrict the gift to a life estate, and quoted many cases in support of his argument.

I am of the opinion that if the Court restricted the interest of the wife in this case to a life estate, it would have to read into the will a limitation on the estate of the wife that is not warranted by the language used.

Counsel also argued that "to hold" meant to hold without spending. Similar words were not so interpreted in *Re Scott*, 58 O.L.R. 138, [1926] 1 D.L.R. 151.

The appeal should be dismissed, with costs to be paid by the appellants to the respondent.

Appeal dismissed with costs, LAIDLAW J.A. dissenting.

Solicitors for the appellant: Elgie and Bolsby, Toronto.

Solicitor for the respondent: J. R. Reycraft, Toronto.

[COURT OF APPEAL.]

Ollson v. Fraser, Barned and Powell.

Evidence—Corroboration—Claim against Estate of Deceased Person—Nature and Sufficiency of Corroboration Required—Inferences from Circumstances—The Evidence Act, R.S.O. 1937, c. 119, s. 11.

The corroboration required by s. 11 of the Ontario Evidence Act, in the case of a claim against the estate of a deceased person, need not be of every detail of the plaintiff's case; it is sufficient if the evidence relied upon as corroborative is evidence of some material fact or facts supporting the testimony to be corroborated. It need not be direct evidence, but may consist of inferences or probabilities arising from other facts and circumstances, tending to support the truth of the witness's statement. *Green v. McLeod* (1896), 23 O.A.R. 676 at 678; *George McKean and Company, Limited et al. v. Black et al.* (1921), 62 S.C.R. 290 at 308; *McGregor v. Curry* (1914), 31 O.L.R. 261; *Radford v. Macdonald* (1891), 18 O.A.R. 167 at 168, 173; *Re Brownlee* (1925), 28 O.W.N. 247 at 248, applied; other authorities referred to.

The plaintiff, who had borrowed money from one B, since deceased, and had made various payments to B in his lifetime, sued the estate to recover an amount which he alleged he had overpaid. The plaintiff's evidence was to the effect that he had borrowed only two sums from the deceased, and the payments made by the plaintiff, as shown by B's books, and by receipts signed by him, were more than enough to repay these two loans in full. The executors contended, and B's books appeared to support the contention, that there had been four loans in all, and that while the two admitted by the plaintiff had been fully repaid, there was a substantial balance owing to the estate on the other two.

Held (Laidlaw J.A. dissenting), there was sufficient, by way of direct testimony and of inferences to be drawn from the established facts, to furnish the necessary corroboration of the plaintiff's evidence, and, the trial judge having accepted the plaintiff's evidence as true, the plaintiff was entitled to judgment.

AN APPEAL by the defendants from the judgment of Wearing Co. Ct. J., of the County Court of the County of Middlesex, in favour of the plaintiff. The facts are fully stated in the reasons for judgment.

12th October 1944. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW JJ.A.

J. R. Cartwright, K.C. (*A. O. McElheran* with him), for the defendants, appellants: An examination of the trial judge's reasons discloses that he failed to instruct himself at all as to the necessity for corroboration of the plaintiff's evidence by some other material evidence, as required by s. 11 of The Evidence Act, R.S.O. 1937, c. 119. The appellants have clearly made out a *prima facie* case of having advanced the money to the respondent, and are entitled to succeed unless the respondent's evidence is such as to overbear the written record. There must be such a confirmation of material facts as "to remove all reasonable doubt from the judicial mind": *Bayley v. Trusts and Guarantee*

Co. Ltd., 66 O.L.R. 254, [1931] 1 D.L.R. 500. This Court is in as good a position as the trial judge to draw inferences from the written evidence: *Powell et ux. v. Streatham Manor Nursing Home*, [1935] A.C. 243. The trial judge, in finding in favour of the respondent, failed to draw the proper inferences from the evidence and to give sufficient weight thereto. The action should be dismissed and there should be judgment on the counterclaim, and costs, including those of the earlier trial, should follow the event.

T. N. Phelan, K.C., for the plaintiff, respondent: The whole onus is upon the appellants to show indebtedness. The evidence of the respondent, his wife and the bank teller is sufficient to enable the Court to draw inferences: *George McKean and Company, Limited et al. v. Black et al.* (1921), 62 S.C.R. 290 at 308, 68 D.L.R. 34. Either the respondent is an honest but stupid person, or else he is entirely dishonest. The trial judge has found him to be an honest man. The matter presently before the Court is *res judicata*, by reason of the order for a new trial: *Kettle v. Dempster* (1913), 5 O.W.N. 149, 25 O.W.R. 115; *Everton v. Kilgour* (1915), 8 O.W.N. 365.

J. R. Cartwright, K.C., in reply: The respondent's case amounts to an allegation that the deceased deliberately falsified his books in order to defraud the respondent. This has not been established with that high degree of proof required where there is an allegation of crime in a civil action, as laid down in *Lang Shirt Co.'s Trustee v. London Life Insurance Co.*, 62 O.L.R. 83, [1928] 2 D.L.R. 449, affirmed, *sub nom. The London Life Insurance Company v. Trustee of the Property of The Lang Shirt Company, Limited*, [1929] S.C.R. 117, [1929] 1 D.L.R. 328, 51 C.C.C. 31.

Cur. adv. vult.

29th December 1944. ROBERTSON C.J.O.:—This is an appeal by the defendants in the action from the judgment of Judge Wearing, of the County Court of the County of Middlesex, dated 12th April 1944, on the trial of the action by him without a jury.

The appellants are sued as the executors of the estate of John Barned deceased, who died in December 1941. The respondent is a barber who had had financial dealings with the deceased Barned, in the way of borrowing money from him. He claimed that he overpaid the deceased, and sued to recover

\$855.12 and interest, and for a declaration that a certain mortgage given by the respondent to the deceased had been paid in full and discharged. The appellants counterclaimed for the sum of \$586.44 and interest, which they alleged was still unpaid in respect thereof. By the judgment the respondent was awarded the sum of \$855.12 claimed by him, and the mortgage in question was declared to be paid and discharged. The counterclaim was dismissed.

Respondent alleges that there were only two loans in respect of which he had dealings with the deceased Barned. The first of these was a loan of \$1,000 made on a mortgage in October 1923. This mortgage was not, however, held by Barned. The mortgagees were Lulu P. Grigg and Lillian Barned, and the money advanced was theirs. Barned was in charge of the transaction and looked after the collection of interest, and all payments of both interest and principal were made to him, and he gave receipts therefor in his own name. It is not disputed that in April 1930 the respondent made the final payment that fully satisfied the principal and interest, and he has a receipt that says so. The receipt, strangely, is not signed by Barned, as all other receipts are, nor by any one. The handwriting, however, is the same as other receipts, and the entries in Barned's ledger show the balance owing as paid on 21st April 1930. There is also the following note at the foot of the account, in the same hand-writing, "Discharge of mortgage not paid for April 21st 1930".

The respondent says that his only other loan transaction was in May 1928, when he borrowed \$300 from Barned to purchase barber's chairs. It is not disputed that this loan, with interest, was fully repaid on 31st October 1931, and in Barned's ledger this account is marked "closed".

The appellants claim that there were two other loans by Barned to respondent. The first, in date, of these two loans, as they appear in Barned's ledger, is a loan of \$600 on mortgage. A mortgage signed by respondent—his wife joining to bar dower—is produced. It is dated 15th July 1929, and it purports to secure the sum of \$600 and interest, upon the same land as that covered by the Grigg and Barned mortgage made in 1923. Respondent says there was no such loan.

The second loan in dispute is of a sum of \$250, which appellants allege Barned advanced by way of loan to respondent, on 15th December 1930. Barned's ledger account regarding this matter is headed, "Charles R. Olson 7% note". No note is produced, however, and apart from this heading in the ledger I think there is no suggestion in the evidence that there ever was such a note. There is produced, however, a cheque for \$250 dated 15th December 1930, from Barned to Charles Olson, and endorsed "Charles Ollson". The cheque is stamped as paid on 26th December 1930. The respondent repudiates the whole transaction, and says he knows nothing of it. Barned's ledger account indicates a number of payments of interest, and payments on account of principal, with final settlement in full in June 1935.

While there would seem to be a strong case for the appellants in respect of the two disputed loans upon the documents and Barned's ledger accounts, supported by numerous receipts produced by the respondent, which indicate payments by him on account of each of the four transactions which the appellants set up, yet this was the second trial of the action, and at both trials judgment has been given for the respondent. It is necessary, therefore, to examine the evidence critically, and further to see what, if any, corroboration there is of respondent's claim, to satisfy the statutory requirement in the case of an action against the executors of a deceased person.

The premises covered by the two mortgages—the one in 1923 to Lulu P. Grigg and Lillian Barned, the other in 1929 to John Barned—are the respondent's barber-shop. In 1923 the premises were owned by respondent and his brother Frederick, both of whom joined in the mortgage. The purpose of the loan was to pay for building a barber-shop on the property. In 1926 respondent acquired his brother's interest in the property, and he carries on his trade there. The loan of \$300, the other sum that respondent admits borrowing, was for the purchase of two barber's chairs. This is the evidence of the respondent, and of his wife.

The respondent kept no record whatsoever either of his borrowings or of his payments of interest or principal, except his receipts from Barned, which he preserved. The learned trial judge was favourably impressed by the respondent's evidence.

He accepted him as an honest man and believed his story as to his dealings with the deceased Barned.

There is this further to be said of the respondent, that he is a man of little education. He kept no books of account, except a record in a book of his day-by-day takings in his barber business and of his expenses. The receipts from Barned which he preserved, and now produces, were not usually such as to inform him plainly of the account to which they related. Commonly, they acknowledge receipt of so much interest or principal on account of mortgage no. 601, or whatever other number Barned assigned in his ledger to the particular account. Occasionally even that identification of the account is omitted, and another identification may or may not appear. In any event the respondent says he never read the receipts on getting them, nor did he ever try to find out from them how he stood. He paid his interest of 7 per centum per annum punctually, and kept steadily, although irregularly, making payments on account of the principal. He appears to have made payments of interest usually when he got notice to do so. Payments on account of principal he seems to have made when he found that he had accumulated a little surplus. All his payments were in cash. At times he had a bank account, but only petty transactions appear in it, and his balance was always trifling. He seems always to have been a quiet, sober, industrious man, living within his means and having no occasion, outside the requirements of his small business, for borrowing money.

It is to such a man that the learned trial judge has given credence, in spite of his continuing, on his own story, to pay interest and principal that he did not owe, and in the face of receipts that seem, obviously enough to one who understands them, to indicate more transactions outstanding than he admits that he had. His chief explanation is that he relied upon Barned. He says that he became dissatisfied when he could not get a complete statement of his account. As time went on, it would appear that respondent's dealings were, to a considerable extent, with Barned's married daughter, Mrs. Land. Barned himself, who was an old man, suffered, according to the respondent, from lapses of memory. Matters came to a head in December 1940 when respondent, being unable to get any satisfaction, went with his wife to Barned's house. Barned was ill, and their interview

was with Mrs. Land and Mr. Fraser, one of the present appellants. The respondent had come for a settlement. On being informed that he still owed something like \$600, respondent at once disputed it. Finally, he said he would make a fifty dollar payment to take care of things until they looked further into it. That is the last payment made by him. Respondent then consulted a solicitor, and on his advice got the assistance of an accountant to look into the account. There were one or two letters written by respondent's solicitor, but no immediate action was taken. Barsed died in December 1941, and respondent brought this action in the following June. It is not, perhaps, out of place to make some reference to Barsed's business. According to the appellant Fraser, Barsed had been head of the furnace department at the McClary works in London. This was no doubt earlier, for he was in his eighties when he died. Respondent speaks of seeing him in his tobacco shop. I find, however, among the exhibits a letter written by Barsed in 1928 on a sheet bearing at its head "John Barsed, Financial Agent" and the words "Trust fund to loan at lowest rates" and "Estates handled, Insurance etc.". His ledgers also indicate considerable lending of money and some knowledge of accounting.

In my opinion, while the written records are largely such as support the position of the appellants rather than that of the respondent, the learned trial judge, who heard all the evidence, and with full appreciation of the case for the appellants did not refrain from presenting to the respondent the difficulties that confronted him and the need for explanations, was in a much better position than the Court of Appeal can be to weigh the value of the respondent's evidence and to judge his reliability as a witness, and I do not think we should reverse his finding that the respondent is an honest man and that his account of his dealings with the deceased Barsed should be believed.

There remains, however, the formidable requirement of corroboration. The respondent cannot succeed in the action, no matter how credible and even convincing his evidence may be, unless his evidence is corroborated by some other material evidence. This is required by s. 11 of The Evidence Act, R.S.O. 1937, c. 119. The corroboration need not be of every detail of respondent's case. It is sufficient that the evidence relied upon as corroboration is evidence of some material fact or facts that

support the testimony that requires corroboration: *McGregor v. Curry* (1914), 31 O.L.R. 261, 20 D.L.R. 706. The evidence to be good corroboration need not be direct. It “. . . may consist of inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness’s statement”: *Green v. McLeod* (1896), 23 O.A.R. 676 at 678, cited, with approval, in *George McKean and Company, Limited et al. v. Black et al.* (1921), 62 S.C.R. 290 at 308, 68 D.L.R. 34. See also *McDonald v. McDonald et al.* (1903), 33 S.C.R. 145.

I shall deal first with the question of corroboration of respondent’s evidence in connection with the appellants’ claim that the deceased Barned lent the respondent \$600 secured by mortgage dated 15th July 1929, upon the same lands as were mortgaged in 1923 to secure the sum of \$1,000 advanced by Lulu Grigg and Lillian Barned. Respondent admits the execution of the mortgage, as does his wife, who joined to bar her dower. Respondent says, however, that this mortgage does not represent a new loan, but that the giving of such a mortgage was arranged for in connection with the advance of \$300 made to him by Barned in 1928 to buy barber’s chairs. He says that at the time of that advance there was still outstanding on the Grigg and Barned mortgage about \$300 of principal—\$325 according to Barned’s ledger—and that it was agreed that Barned would put up the money to pay off the Grigg and Barned mortgage, and would take a new mortgage for the \$300 advanced to buy the chairs, and for the amount required to pay off the old mortgage. This explanation gets some support from the following heading in Barned’s ledger of the account for the \$300 advanced in 1928 to buy barber’s chairs:—“Charles Olson Mortgage to Pauline Grigg and Lillian Barned, their balance of April 24th, 1928 was \$325.00. I advanced Olson \$300.00 more on mortgage. Total \$625.00 see letter in No. 601.” This heading may reasonably be assumed to have been made when the account was opened, and it plainly suggests that the account was intended in some way to relate to the balance owing on the old mortgage as well as to the fresh advance of \$300, which latter sum was also to be secured by mortgage.

No. 601 is the number of the account in Barned’s ledger of the Grigg-Barned mortgage. No letter, such as the heading refers to, has been produced, nor is there any evidence in regard

to it. The first entry in this account is of the loan of \$300 on 5th May 1928, and all subsequent entries relate only to that matter. That loan was not secured by mortgage unless the \$600 mortgage secured it as the respondent and his wife both say.

There is, however, more to be said on the matter of the \$600 mortgage. Barsed, it is quite plain, did not make any advance to pay off the old mortgage. He applied money received from the respondent to pay it, as appears by the entries in the ledger and by the receipts produced by respondent. The last payment is credited in the ledger under date 21st April 1930, and this balanced the account. This does not, however, disprove respondent's statement as to what their arrangement was, nor does it prove that he knew Barsed was not living up to it. He would have had the same amount to pay in either case. It is to be remembered that the respondent has no exact dates of his own. He and his wife say that the \$600 mortgage was not executed in the summer-time, notwithstanding that its date is 15th July. They say they were wearing their heavy coats on this occasion. Barsed's dates may not always be the true dates, and his daughter, Mrs. Land, who was the witness to this mortgage, was not called to contradict the respondent and his wife.

A fact of some significance is that Barsed did not register the \$600 mortgage at the time nor for more than eleven years afterwards, long after the mortgage fell due. It was not registered until 11th December 1940, nor did the witness, Mrs. Land, Barsed's daughter, make her affidavit of execution until that date. At that time, December 1940, the respondent was pressing for a settlement of his account, and Mrs. Land was taking an active part, Barsed himself being then ill. No explanation is given of the non-registration of the mortgage. If the mortgage was given as security for a new and independent advance of \$600 actually made at the time as appellants claim, why was not the mortgage registered promptly? There is no evidence of the making of the advance of \$600, or of any sum, at or about the date of the mortgage beyond the evidence afforded by the mortgage itself. No cheque or other voucher is produced, nor a bank account showing the withdrawal of such a sum from Barsed's account. The omission to complete and register the instrument is consistent with respondent's account of the arrangement to give it and a decision on Barsed's part not to

register the mortgage until he had completed their arrangement by advancing the amount necessary to pay off the old mortgage—something that he never did.

In my opinion the inferences to be drawn from the heading in Barned's ledger of the account of the \$300 loan, and from non-registration for eleven and a half years of the \$600 mortgage, afford corroboration of the respondent's evidence in respect of that mortgage, and supported as his evidence is by the evidence of his wife who was also a party to the giving of the mortgage, the learned trial judge was warranted in giving effect to respondent's claim in that regard.

There remains the question of corroboration of respondent's evidence in regard to the item of \$250 alleged by the appellants to have been advanced by Barned in December 1930. For this item a cheque is produced, made by Barned, payable to Charles Olson and appearing to be endorsed by the latter. The cheque bears date 15th December 1930, and is endorsed with the name "Charles Ollson". The trial judge was apparently satisfied that this is in the handwriting of the respondent. The latter says, however, and the trial judge has accepted his statement, that he never knowingly endorsed such a cheque, and that he did not get the money it represents. The cheque is stamped "Paid" on 26th December 1930.

The account in Barned's ledger of this transaction appears in a somewhat unusual way. It is entered on the reverse side of the ledger sheet that carried the account of the old \$1,000 mortgage to Grigg and Lillian Barned. Both in the ledger and in Barned's receipts, it is given the same number—601—as the account of this old mortgage, which had been paid in full in April 1930, eight months before. The heading of the account itself, as it appears in the ledger, is "Charles R. Olson 7% note." No note has been produced, nor has the existence of any note been shown, nor has its non-production been accounted for. In the receipts given by Barned in connection with this account he refers to the transaction as "Mortgage 601", just as he had done in connection with the old mortgage which was already paid in full.

There is further in connection with this item the evidence of the teller in a branch office of the Huron & Erie Mortgage Corporation, on which Barned's \$250 cheque was drawn—one

Sherlock—to the effect that the cheque was not cashed, but had been redeposited. He said that according to the established practice of the Corporation, a cheque for more than \$100 required the initials of the manager or accountant before being cashed, and the initials are not there. It is not suggested that respondent had any account there in which it could have been deposited.

I should mention one other piece of evidence that may have some relation to the \$250 item. A letter or memorandum addressed to Barsed and signed by Ollson, and bearing date 15th December 1930, the same date as the \$250 cheque, was put in. It is headed "Re mortgage Olsen-Grigg & Barsed" and reads, "In reply to yours I might say that the amount of principal now owing, two hundred and fifty dollars and interest at the rate of seven per cent per annum calculated half-yearly from the fifteenth day of December A.D. 1930, which mortgage bears date the twenty-fourth day of October A.D. 1923",—then follows a full description of the mortgaged premises. Respondent says that Barsed presented it to him for signature at his barber shop, and that he signed without reading it, Barsed telling him that it was to show that he, Ollson, had got his note for \$300 back. The old mortgage, as already stated, had been paid in full in April of that year, and respondent had Barsed's writing to that effect. It is difficult to believe that respondent, in these circumstances, knowingly signed an acknowledgment that there was still outstanding \$250 of principal on this mortgage. It is also unlikely that Barsed would take such an extraordinary way of securing a fresh advance, the Grigg and Barsed mortgage having been paid in full and not being his mortgage at any time. It is very significant that for the alleged loan of \$600 Barsed held as security only an unregistered mortgage, and for the alleged loan of \$250 only a mortgage that had already been paid off. Barsed knew how to secure himself properly when he was entitled to be secured.

While the omission of the trial judge from his reasons for judgment of any mention of the matter of corroboration has made it necessary to discuss the question at some length, I am satisfied that the necessary corroboration is to be found in the evidence.

The appeal should, therefore, be dismissed, with costs.

GILLANDERS J.A.:—The trial judge has believed and accepted the testimony of the respondent (plaintiff). Although the evidence gives rise to many conflicting conjectures and inferences, there is no fact established with sufficient clarity to show that the trial judge was in error in accepting the respondent's evidence. I unreservedly accept that finding, based as it is on the credibility of the respondent, who was seen and heard by the trial judge.

But that finding alone does not conclude the matters to be considered. In this action the respondent claims against the estate of a deceased person, seeking a declaration that a mortgage which he executed in favour of the deceased was paid in full, and also a judgment for the repayment of certain moneys which he claims to have overpaid.

Section 11 of The Evidence Act, R.S.O. 1937, c. 119, requires, under these circumstances, that his evidence be "corroborated by some other material evidence". It is desirable to have clearly in mind what is required here by this statutory provision, which makes a rule of law of what was previously a rule of practice in some of the courts of England: *Re Jackson*, 64 O.L.R. 215, [1929] 4 D.L.R. 213.

It is sufficient here to refer to only a few of the many decided cases. In *Radford v. Macdonald* (1891), 18 O.A.R. 167 at p. 168, Hagarty C.J.O. observes, "It has been well put by more than one of our own judges that evidence that strengthened the probability of the plaintiff's evidence being true, was corroborative evidence: *Costello v. Hunter*, 12 O.R. 333," and in the same case Maclellan J.A. says, at p. 173, "'Corroborate' means to strengthen, to give additional strength to, to make more certain, and if the evidence helps the judicial mind appreciably to believe one or more of the material statements or facts deposed to by the party, then, I think, it is what is required by the statute. In such cases, the weight of the evidence will vary, but its admissibility cannot depend on its weight. In some cases it may be weak and in others strong, but the Legislature has not said that it must be strong, but merely that it must be sufficient to corroborate, that is, to strengthen, the evidence of the party." See *Rex v. Silverstone*, [1934] O.R. 94, 61 C.C.C. 258, [1934] 1 D.L.R. 726. In *Re Brownlee* (1925), 28 O.W.N. 247, Middleton J.A. says, at p. 248: "The ground of appeal chiefly urged was

that the claimant's testimony was not adequately corroborated. If by this was meant that the claimant had not proved her case apart from her own evidence, the executor was right; but that is not the meaning of The Evidence Act, sec. 12, nor the effect of the decided cases," and at p. 249, "Suspicion of the claimant's case was aroused by the fact that the part of the claim disallowed was found to have been fabricated; but the Surrogate Court Judge had believed the claimant and accepted her story, and it could not be said that he was wrong—the corroborative evidence being amply sufficient to lead the Court to suppose that the claimant's story, if accepted at all, was true in all respects."

The trial judge does not discuss the matter of corroboration, but I assume he thought the plaintiff's own evidence was corroborated by testimony or inferences which he accepted. I think the evidence not only contains testimony, but will support inferences which provide sufficient corroboration in this case. The evidence of the witness Sherlock, supporting the statement that the cheque for \$250 was not cashed, and that of the respondent's wife, together with some inferences which may be drawn from the admitted facts, while together they would not independently establish the plaintiff's case, are sufficient, if accepted, to provide the required corroboration.

The appeal should be dismissed with costs.

LAILAW J.A. (*dissenting*):—This is an appeal from a judgment of His Honour Judge Wearing, dated 12th April 1944, whereby the plaintiff recovered \$855.12, and a counterclaim of the defendants was dismissed.

In 1923 the plaintiff borrowed \$1,000, and a mortgage in favour of Lulu Pauline Grigg and Lillian Bamed was given to secure payment of the loan. Payments on account of interest and principal were made from time to time, in varying amounts, to the late John Bamed.

On or about 5th May 1928 a balance of \$325 was owing to the mortgagees for principal. The plaintiff required \$300 at that time to purchase chairs for his barber shop, and borrowed it from Mr. Bamed. He says "I owed him around \$300. I figured on the old mortgage like and when I got the \$300 in a loan from him I said, 'Now, you pay off the first mortgage, and I will give you a new mortgage to take care of the whole thing against the property. . . .'" That was not done at that time, but a book of

accounts produced by the defendants shows (on p. 313) a heading "Charles Olson Mortgage to Pauline Grigg and Lillian Barned, their balance on April 24th 1928 was \$325.00. I advanced Olson \$300.00 more on mortgage, Total \$625.00. See letter in No. 601". The account under this heading has entries commencing "1928, May 5, Loan 300.00" with following debit charges annually for interest, and credit payments for interest and principal, the last one being for the full amount of balance owing, 31st October 1931. This account appears as a separate record from the one covering the first loan of \$1,000, which is on p. 601.

On or about 15th July 1929, the plaintiff and his wife executed a mortgage in favour of John Barned for \$600. The account book contains a record (p. 325) showing "1929—July 15, loan 600.00" with debits and credits, and a balance owing, including interest to June 1941, of \$541.20, the amount owing for principal being \$525.00.

A fourth account, headed "Charles R. Olson 7% Note", commences "1930, Dec. 15, Loan—250.00", and ends with an entry for the balance paid 19th June 1935. The defendants produce also a cheque drawn on the Huron & Erie Mortgage Corporation, dated 15th December 1930, payable to Charles "Olson," purporting to be signed by John Barned and endorsed "Charles Ollson". The cheque bears a stamp of the Corporation, "Accepted Dec. 26, 1930" and also a stamp, "Paid Dec. 26, 1930" with the number "2" identifying a cashier of the Corporation.

The plaintiff maintains that he did not receive the sum of \$600 said by the defendants to have been lent to him by the late John Barned under the terms and conditions of the mortgage dated 15th July 1929, and that he did not receive the sum of \$250.00 represented by the cheque dated 15th December 1930. He asserts that he borrowed two sums only, *viz.*, the amount of \$1,000 in 1923 and the amount of \$300 in 1928, and that there were no other moneys advanced to him at any time by the late John Barned. He continued year after year to pay varying amounts on account of interest and principal until December 1940, without receiving a statement of account, and not knowing the amount owing to discharge his debts. He was unable to obtain a statement from Mr. Barned, who died before one was delivered or prepared. He now claims for over-payments alleged

to have been made by him, and the defendants counterclaim for the balance said to be owing by the plaintiff.

There is much in the transactions between the plaintiff and the late John Barsed which is unexplained in the evidence and cannot be satisfactorily explained by counsel or by me. An examination of the account books produced by the defendants shows that after 5th May 1928 the plaintiff was credited with payments on account of principal, to the total amount of \$970. Is it probable that he would pay so much if he owed only about \$600, as he says? If the plaintiff intended and proposed at the time he borrowed \$300, on 5th May 1928, that he would give a new mortgage to cover this amount and the balance of about \$325 on the old mortgage, why was there a delay until 15th July 1929 before such a mortgage was executed? Why, if he needed a loan of \$250 on 15th December 1930, should there be the interval to 26th December, shown by the stamp on the cheque to be the date of payment? How could he forget the receipt of the sums of \$600 and \$250 if in fact he received them? And yet, he declares he did not get either or any part of those amounts. On the other hand, although the advance of \$300 is plainly identified in the accounts as the added part of the principal secured by the mortgage in favour of Grigg and Lillian Barsed for \$1,000, it may be inferred from a notation "Discharge of mortgage not paid for April 21st, 1930" that John Barsed treated that mortgage as discharged at that date, but nevertheless kept open the account for \$300 until October 1931. Perhaps he would not have delivered a discharge until the debt of \$300 was fully paid. Why was the mortgage for \$600, dated 15th July 1929, not registered until 1940, and no affidavit of execution made until 1940? Why would John Barsed set up and carry accounts for four loans unless these loans actually were made and existed? The only possible explanation would be that the late John Barsed was engaged in a deliberate fraud against the plaintiff. There are other mystifying, and perhaps suspicious, circumstances, but, in the view I take of the case, it becomes unnecessary to solve or explain them. I think that the right of the plaintiff to recover depends on whether or not there is corroboration of his evidence within the meaning and provisions of The Evidence Act, R.S.O. 1937, c. 119. Section 11 of that statute is as follows:—

"11. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

The evidence in this case which requires corroboration by some other material evidence is the testimony of the plaintiff that he did not receive the sum of \$600 or the sum of \$250. The proper judicial attitude is to approach the evidence of the plaintiff with suspicion: *Bayley v. Trusts and Guarantee Co. Ltd.*, 66 O.L.R. 254 at 258, [1931] 1 D.L.R. 500. But the study is not directed solely to the credibility of the plaintiff. The question is not whether the plaintiff is to be believed or not, but whether effect can be given to his evidence. The learned judge made it plain that he accepted the plaintiff "as an honest man", and that he believed the story told by him. I accept that view, and direct enquiry only to the question whether there is adequate corroboration in law. It is not necessary that an independent or disinterested witness testify in support of the plaintiff's evidence. The corroboration required by statute may consist of inferences or probabilities: *George McKean and Company, Limited et al. v. Black et al.* (1921), 62 S.C.R. 290 at 308, 68 D.L.R. 34. It need not be in respect of the "vital and essential" portion of the plaintiff's evidence, but there must be such a confirmation of material facts as "to remove all reasonable doubt from the judicial mind": per Middleton J.A. in *Bayley v. Trusts and Guarantee Co. Ltd.*, *supra*, at p. 258. I apply these rules to the case under consideration. In respect of the evidence of non-receipt of the sum of \$600, it is my view that there is no corroboration of the plaintiff's evidence within the meaning and requirement of The Evidence Act. I do not find the requisite strength, either from inferences, probabilities or otherwise, which enables me to give effect in law to the evidence of the plaintiff in respect of this item.

The evidence relied upon by the respondent as corroboration of the plaintiff's evidence that he did not receive the sum of \$250 has caused me much anxiety and deliberation. My conclusion, however, is that this part of the plaintiff's claim must also fail for want of adequate corroboration. The evidence of

the cashier, identified on the cheque by the number "2" as being the person in the bank who would, in the ordinary course, make payment of it, is of some weight and relevant to a material fact. He testified that it would be a violation of the rules of the bank for him to pay the amount of the cheque to Charles Ollson, the payee, who was unknown to him, unless he had authority so to do from the manager or accountant evidenced by their initials on the cheque. There are no initials thereon, and the cashier feels certain therefore that the cheque was not cashed. But, nevertheless, after repeated readings of the entire evidence I continue to have a reasonable doubt as to whether the plaintiff did in fact receive the money. Possessing that doubt, I must hold that the plaintiff's case has not been established.

Respondent's counsel argued that the matter before the Court is *res judicata*. He relied on the cases of *Kettle v. Dempster* (1913), 5 O.W.N. 149, 25 O.W.R. 115, and *Everton v. Kilgour* (1915), 8 O.W.N. 365. I think those cases are distinguishable. There has not been a prior determination of the question now before the Court.

My opinion is that the appeal should be allowed with costs; the judgment of the learned judge should be set aside and judgment entered dismissing the action with costs, and allowing the counterclaim with costs.

Appeal dismissed with costs, LAIDLAW J.A. dissenting.

Solicitors for the plaintiff, respondent: Vining, Dyer & Grant, London.

Solicitor for the defendants, appellants: A. O. McElheran, London.

[COURT OF APPEAL.]

Rex v. Reardon.

Evidence—Corroboration—Nature and Sufficiency—Statutory Requirement.

Criminal Law—Evidence—Offences requiring Corroboration—Sufficiency of Corroboration—Direction by Trial Judge—The Criminal Code, R.S.C. 1927, c. 36, ss. 301(2), 1002.

The corroboration required by ss. 301(2) and 1002 of The Criminal Code must be independent evidence, either direct or circumstantial, which tends to show, not only that a crime has been committed, but that the accused committed it. *Rex v. Baskerville*, [1916] 2 K.B. 658, applied. Evidence of an early complaint by the complainant, while it is corroborative in the sense that it tends to confirm her credibility (*Shorten v. The King* (1918), 57 S.C.R. 118; *Rex v. Bowes* (1909), 20 O.L.R. 111), is not independent evidence, and is therefore not corroboration within the statutory requirement. *Hubin v. The King*, [1927] S.C.R. 442, applied. Mere proof of opportunity is not in itself corroborative. *Burbury v. Jackson*, [1917] 1 K.B. 16, applied. But other circumstances, including false statements made by the accused in relation to the opportunity, may give to a proved opportunity a different complexion from that which it would otherwise bear. *Dawson v. M'Kenzie*, [1908] S.C. 648; *Rex v. Drew*, [1933] 1 W.W.R. 225, applied. The conduct of the accused on his arrest and when confronted with the complainant, and the making of inconsistent statements to the police, may be circumstances from which the jury may infer an acknowledgment of guilt, and may thus be corroborative. *Hubin v. The King*, *supra*, applied. All of the complainant's story need not be corroborated, and circumstances which may in themselves be capable of an innocent construction may be corroborative, if the circumstances are such that the jury can infer that they point to the guilt of the accused. *Rex v. Threlfall* (1914), 10 Cr. App. R. 112, applied.

On appeal from a conviction for carnal knowledge, under s. 301(2), *held*, (GILLANDERS J.A. dissenting), there were circumstances in the evidence, proved by witnesses other than the complainant, as to the accused's conduct which might be regarded as corroborative of the accused's story, and it was for the jury to say whether or not they should be so regarded. Since, however, the trial judge had pointed out to the jury, as evidence which might be considered corroborative, matters which could not properly be so considered, there must be a new trial.

AN APPEAL by the accused from his conviction, before Roach J. and a jury, of an offence under s. 301(2) of The Criminal Code, R.S.C. 1927, c. 36. The facts are fully stated in the reasons for judgment.

5th December 1944. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and McRUER JJ.A.

G. L. Fraser, K.C., for the accused, appellant: There was no corroboration of the complainant's evidence on either count, and the trial judge should have directed a verdict of acquittal: *Rex v. Feigenbaum*, [1919] 1 K.B. 431; *Rex v. Ross* (1924), 18 Cr. App. R. 141. There is no evidence of anything inconsistent with consent, and much to indicate consent. There is no positive evi-

dence, apart from the complainant's, to indicate that anybody had intercourse with her. The evidence indicated by the trial judge is not corroborative.

[ROBERTSON C.J.O.: Why is it not corroboration that this girl, in all the circumstances, is taken out by the accused, given rum to drink, and then taken out again, all of which is proved by independent evidence? See *Rex v. Bristol*, 58 N.S.R. 533, 46 C.C.C. 156, [1926] 4 D.L.R. 753.] I rely on *Hubin v. The King*, [1927] S.C.R. 442, 48 C.C.C. 172, [1927] 4 D.L.R. 760; *Rex v. Killick* (1924), 18 Cr. App. R. 120.

Mere evidence of opportunity is not corroboration: *Rex v. Baskerville*, [1916] 2 K.B. 658; *Forsythe v. The King*, [1943] S.C.R. 98, 79 C.C.C. 129, [1943] 2 D.L.R. 737. The girl's complaint to her mother is not corroboration: *Rex v. Lovell* (1923), 17 Cr. App. R. 163; *Reg. v. Lillyman*, [1896] 2 Q.B. 167. [McRUER J.A.: In *Shorten v. The King*, 57 S.C.R. 118, 42 D.L.R. 591, [1918] 3 W.W.R. at 9; *Rex v. Osborne*, [1905] 1 K.B. 551, and *Rex v. Bowes* (1909), 20 O.L.R. 111, 15 C.C.C. 326, a complaint seems to have been regarded as corroboration.] Only to the extent that the fact of an immediate complaint is considered to be consistent with the truth of the complainant's story. [GILLANDERS J.A.: There is a clear distinction between evidence which tends to show the truth of the girl's story and independent evidence which tends to implicate the accused in the commission of a crime.] Yes.

C. P. Hope, K.C., for the Crown, respondent: The whole question, as to the charge of carnal knowledge, is one of corroboration. I can find nothing in the evidence beyond that which has been indicated by ROBERTSON C.J.O. during the argument. The fact that the complainant and the accused were together until 8 or 8:30 in the evening is corroborated. [ROBERTSON C.J.O.: If we are of the opinion that what the trial judge pointed out to the jury was not corroboration, can we sustain the conviction on the ground that there was other evidence which might be regarded as corroborative?] I think not.

G. L. Fraser, K.C., in reply.

Cur. adv. vult.

2nd January 1945. ROBERTSON C.J.O. agrees with McRUER J.A.

GILLANDERS J.A. (*dissenting*):—I have read with interest the clear and careful judgment of my brother McRuer. With respect, I have been unable to reach a like conclusion. In view of the fact that the majority of the Court is of opinion that there should be a new trial, it is desirable that I should only briefly indicate my reasons.

There seems ample corroboration, in the evidence of the physician who examined the complainant, that the offence charged had been committed by some person. This, however, does not implicate the accused. “. . . corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused”: *Rex v. Baskerville*, [1916] 2 K.B. 658 at 667, 12 Cr. App. R. 81 at 91.

The difficult question is whether or not there is such evidence.

Proof of opportunity is, in itself, not corroboration. Indeed, it would seem that where opportunity is established, the specific provisions of the statute become of first importance. It is observed on *Dawson v. M'Kenzie*, [1908] S.C. 648, that while mere opportunity does not amount to corroboration the circumstances and locality of the opportunity may be sufficient and the “opportunity may have a complexion put upon it by statements made by the defender which are proved to be false.”

The evidence of the course of events from the time the accused came to his wife's apartment where the complainant and his own daughter were, until, he says, he parted from the complainant after leaving his rooms, has caused me consideration. However, I think it is not sufficiently proximate in time or place, and does not, in other respects, provide a basis on which a jury should be invited to consider it corroborative. In this respect the circumstances are to be distinguished from those in such cases as *Rex v. Bowes* (1909), 20 O.L.R. 111, 15 C.C.C. 326, where there is evidence of events much more proximate which tend to connect the accused with the commission of the crime.

If there had been evidence here of marks on the blanket which might indicate that it had been used as alleged, or if there were evidence that the accused had been seen with the complainant after he said they had separated, which tended to

confirm her story of events, or that his car had been seen at a place and time which tended to the same result, or any sufficient circumstantial evidence to the like effect, the situation might well be different.

Evidence of the behaviour of the accused and of any response made by him when charged with the crime is admissible, and might, under proper circumstances, provide corroboration: *Hubin v. The King*, [1927] S.C.R. 442, 48 C.C.C. 172, [1927] 4 D.L.R. 760; *Rex v. Christie*, [1914] A.C. 545. In my view, there is no evidence adduced here of the accused's conduct, demeanour, or response, which could be interpreted as tending to implicate him in the crime.

No doubt the jury disbelieved his story, amounting to an alibi, and the evidence of his witnesses. They were entitled to reject it, and one can readily understand, even without seeing the witnesses, why they might do so. There is no evidence that the accused was asked anything about a blanket until he was in the witness stand, when he denied that there was one in his car. I think, however, that the complete rejection of his evidence where it differs from that of the complainant does not provide corroboration. If the evidence is not to be believed, it should, I think, be taken out of the case altogether: *Dawson v. M'Kenzie*, *supra*.

In addition to accepting the evidence of the complainant and disbelieving the accused, which the jury was fully justified in doing, the plain requirement of the statute respecting corroboration implicating the accused remains to be satisfied, and, in my view, evidence is lacking here in which it could be found. In the result the conviction should be quashed.

MCRUER J.A.:—This is an appeal by the accused from his conviction on a charge of carnally knowing Joan De Rush, a girl of previously chaste character under the age of sixteen years and above the age of fourteen years, contrary to s. 301(2) of The Criminal Code, R.S.C. 1927, c. 36. The indictment on which the accused was tried contained two counts, one of rape and one of carnal knowledge. On the former the jury disagreed, and the trial of the accused on that count has been traversed to the next Assizes.

Two grounds of appeal were taken by counsel on behalf of the accused: (1) there was no corroboration of the story told

by the complainant; (2) the learned trial judge misdirected the jury in regard to what constitutes corroboration and indicated certain facts as being corroborative of the story told by the complainant which do not amount to corroboration.

The main evidence against the accused was the evidence of the complainant Joan De Rush. Under the provisions of s. 1002 of The Criminal Code, and under s. 301(2), it was not open to the jury to convict the accused unless the evidence of the complainant was "corroborated in some material particular by evidence implicating the accused."

It is not sufficient that the jury should implicitly believe the evidence of the complainant. There must be corroborative evidence, either direct or circumstantial, which not only tends to show that a crime has been committed, but it "must tend to show that the accused committed the crime": *Rex v. Baskerville*, [1916] 2 K.B. 658, 12 Cr. App. R. 81; *Hubin v. The King*, [1927] S.C.R. 442, 48 C.C.C. 172, [1927] 4 D.L.R. 760. Evidence that the complainant complained to her mother immediately on her return home was admissible and corroborative of her story in the sense that it tended to confirm her credibility: *Shorten v. The King*, 57 S.C.R. 118, 49 D.L.R. 591, [1918] 3 W.W.R. at 9; *Rex v. Bowes* (1909), 20 O.L.R. 111, 15 C.C.C. 326, but it is not *independent* evidence implicating the accused: *Hubin v. The King*, *supra*. Mere opportunity in itself is not corroboration. In *Burbury v. Jackson*, [1917] 1 K.B. 16, the Lord Chief Justice (Lord Reading), at p. 18, says: "The evidence here shows nothing more than that it was possible to have committed the misconduct at the material date. That is not enough. The evidence must show that the misconduct was probable." Other circumstances, however, including false statements made by the accused in relation to the opportunity, may give to a proved opportunity a different complexion from that which it would have borne had no such false statement been made.

In *Dawson v. M'Kenzie*, [1908] S.C. 648, Lord Dunedin stated, at p. 649: "Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is that the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration. The other is that the opportunity

may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made." See also *Rex v. Drew*, [1933] 4 D.L.R. 329 at 336, [1933] 1 W.W.R. 225, 60 C.C.C. 37.

In *Hubin v. The King*, *supra*, the conduct of the accused on his arrest and when confronted with and identified by the complainant, and in voluntarily making two inconsistent statements, were held to be circumstances from which the jury might infer some acknowledgment of guilt and to be regarded as corroboration. All of the complainant's story need not be corroborated. "What is required is some additional evidence rendering it probable that the story of the accomplice [in this case the complainant] is true and that it is reasonably safe to act upon it. . . . It is sufficient if there is confirmation as to a material circumstance of the crime and of the identity of the accused in relation to the crime . . . evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. . . . The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

"The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime": *Rex v. Baskerville*, *supra*, at pp. 665-7.

Circumstances which may in themselves be capable of an innocent construction may be corroborative; ". . . the question is whether the jury could draw the inference that it pointed to his guilt." *Rex v. Threlfall* (1914), 10 Cr. App. R. 112 at 116.

It is the duty of the trial judge to direct the jury that corroboration is required and to find whether there is evidence which may be corroborative of the complainant's story. It is the function of the jury to determine whether the evidence is corroborative of the complainant's story.

The learned trial judge in his charge to the jury, in a careful and unexceptionable manner, repeatedly made it clear that the evidence of the complainant must be corroborated by "independent evidence which affects the accused man by connecting or tending to connect him with the crime." He emphasizes that "It must confirm in some material particular not only that the crime was committed but that the accused man committed it." He stated that it must be "independent evidence, not evidence coming out of the mouth of a man or woman who saw the act being committed, but none the less independent evidence which connects or tends to connect the accused with the crime". After this clear and emphatic statement of the law, the learned judge stated to the jury that he did not propose to go over all the evidence, and he proposed only to refer to parts of it, and he stated that because he referred to parts of it the jury was not to conclude that the parts that he did not refer to were unimportant. He then dealt with the evidence, to which I will refer in detail later.

Counsel for the accused takes exception to two passages in the learned trial judge's charge: (1) his reference to a blanket, and (2) his reference to \$2. The learned trial judge said: "Counsel says that the suggestion that the blanket constitutes corroboration is just so much nonsense. I disagree. It may be pertinent. It is for you to say." And again he stated: "Then, gentlemen of the jury, when you are looking for corroboration perhaps you will pay some attention to this story about the \$2, a little thing, perhaps, but sometimes an accumulation of little things amounts to a lot. Whether they do in this case is for you to say, but some man that night had intercourse with that girl. Who was it? The Crown points to the accused and says he is the man. The Crown has to prove it beyond a reasonable doubt. Has the Crown succeeded?" After having carefully reviewed the facts, and toward the end of his charge, the learned trial judge directed the jury's attention to the fact that the girl was last seen with the accused when he left the De Long house at

8 or 8:30 o'clock, and by 12 o'clock, some man had had intercourse with her. It was put this way to the jury:—"Is there in all the evidence one bit of independent evidence quite apart from the words that came out of her mouth that connects the accused or tends to connect him with the crime and to show that he is the man who committed the act? That is what you have to decide. . . . Is there corroboration? If, in your opinion, there is, you will attach to it such weight as you think should be attached to it."

The evidence shows that the accused is a married man, thirty-five years of age, living separate from his wife. He occupied rooms rented from a Mrs. De Long at 401 Devine Street, in the city of Sarnia. On the afternoon of the 19th May the accused invited some men to his apartment, where they drank a portion of a bottle of rum. At about seven o'clock in the evening the accused went to the apartment occupied by his wife, he says, to see her. His wife was not at home, but Barbara Reardon, his daughter, who lived with her mother, and the complainant Joan De Rush, his niece, were there. According to the evidence of Joan De Rush, the two girls were having supper and they told the accused that his wife would not be back until 7:30. He said he was hungry and that he wanted a cup of tea, which they gave him, and that he was going to work near midnight. He wanted them to go with him to pack his lunch box. He coaxed Barbara to go to pack his lunch. This she refused to do, and he coaxed the complainant to go with him to pack his lunch. She says that he handed her a \$5 bill, which she would not take, and he sent Barbara over to the store for three bottles of pop, and that on Barbara's return he offered the complainant \$2. The accused said he was hungry and asked the girls to go down to a restaurant with him to have something to eat. Barbara said she was not hungry. He then invited the complainant to go with him to the restaurant, which she consented to do. She says she went back upstairs for the accused's keys, which he had forgotten, that she hid from him, and that he came upstairs and tried to pull the two girls downstairs. She says she ultimately went with him, but that they did not go to a restaurant for a meal but drove to the Coney Island Cafe where he bought three hot dogs and told her to eat them. She did not eat them. They went from there to his apartment on Devine

Street. He told the complainant to come in, but she said she would "wait out here". He said "You had better come in." She went upstairs to his room. While they were there he went to warm the hot dogs, and the complainant started to cough. The accused said he would get some milk. He went downstairs and got some milk, poured some into a glass and mixed rum with it. The complainant said she refused to drink it and that he put more rum into it. The milk was a brown colour. She said to him "I don't drink rum". He said, "It will make you stop coughing". She finally drank half a water glass of rum and milk. In about half an hour she said to him that she wanted to go home. He said, "All right, I will take you home." She then went downstairs and got into his car. They drove down Devine Street to the Plank Road, where he stopped the car and started to fondle her, to which she objected. Following this the offence was committed under circumstances that it is unnecessary to go into in detail, except to say that the complainant says the accused took a blanket out of the motor car and spread it on the ground.

After she was attacked the complainant says they drove back to the city and that she said she wanted to go home. The accused said, "I am not going home just yet because I have to get my lunch bucket." She asked where it was, and he said, "When I was up at the party this afternoon a guy took it out of my apartment." He went into a house on Palmerston Street and came out and drove back to the same place on the Plank Road, and there the offence was again repeated.

The accused in giving evidence admits that he had gone to his wife's home. He asked the girls if they had eaten and they said "No." He asked them if they would care to go uptown and have something to eat with him and they said, yes they would. The complainant and he went down and got into the car. Barbara did not come down, he said because she was "a kind of bashful little girl". He says that he said "All right, Barbara, I will come back and take you to the show. How is that?" and she said "All right." The accused says he intended to take the complainant to the Savoy Restaurant, but she did not want to go to the Savoy Restaurant. So he suggested that they would get three hot dogs and warm them up at his apartment, and there he would change his clothes and go to the show. The

complainant said she might as well go up and see what kind of an apartment he had. While the complainant was there she got a bad coughing spell and he says, "there was this empty rum bottle with possibly half an ounce or quarter of an ounce of rum in the bottle, and I said . . . 'I will put a little rum in the glass of milk and maybe that will stop the coughing, the tickling in your throat.'" He says, "There was what you would usually find in an empty bottle, not an ounce in the bottle . . . there would not be a good drink, would not be an ounce in it." He admits that he gave rum and milk to the complainant and she drank it. He says he went down and talked to Mrs. De Long for a few minutes and she told him that one of the men that had been there in the afternoon had come back and taken his lunch box by mistake. He says he was supposed to be on the midnight shift. He then decided he would not be able to take the children to a show, that he would have to go and look for his lunch box. He left with the complainant in his car about 7.30 and let her out at the corner of Cobden and Mitton Streets. He said to Joan, "I have to go up town and see if I can find my lunch bucket. You tell Barbara and Betty I will be up some day next week." She said, "I will go anyway." He said, "Don't stay out too late." He says he drove on towards town and went down two or three different streets and up to where he had taken the man home who had taken his lunch box. He could not find the house where he had previously let him out. He drove up town and parked by Stirritt's Store and was sitting in the car for a while when this man that he had been looking for came along with a soldier who had been with them in the afternoon. They talked for a while and the man in question, whose name was Joe Walters, got into the accused's car. The soldier had to meet somebody at the hotel and he went away.

The accused says that in the morning he had met an old friend of his that used to work at Kellogg's, and that he had invited him to come out that evening if he got a chance. This man's name was Smith and he is referred to in the evidence as "Smithy". The accused says that he drove out to Smith's in the evening and that Joe Walters was with him, but that he remained in the car. He says that he stayed at Smith's place for two hours and that he left about 10.30 or 11 o'clock in the

evening. The accused did not go to work at twelve o'clock, and was found in bed when arrested by the police at 2.30 a.m.

Walters, who is said to have taken the lunch box, and who is said to have been in the accused's car that evening at the time the offence was supposed to have been committed in or near the car, was not called as a witness. Smith and his sister, Mrs. Pears, gave evidence that the accused was at Smith's place until 10.30 or 11 o'clock, and that he said he was going home because he was going to work. Smith says he remembers the day because he heard the next day that the accused had been arrested. Smith was asked in direct examination when he first heard that the accused was supposed to have spent the night somewhere else, he said "When I went to gaol." His evidence was that he was talking to the accused in gaol when the accused told him "the charge he was up on". Smith was not arrested until the 12th July, nearly two months after the accused was arrested, and about five weeks after the preliminary hearing in this case.

Police Constable Whiting stated that when he arrested the accused on the morning of 20th May, he found him in his apartment asleep. He woke him up and he told him he had a warrant for his arrest on a charge of rape on an information laid by the mother of Joan De Rush. He says the accused got up and put on his clothes and "he said there was nothing to it, and also said he had taken the girl down and bought some hot dogs." The accused says that the officer said that he had a warrant and that it was a pretty serious charge—rape—and that he, the accused, asked "What are you talking about?". The accused's evidence continues as follows: "and he said: 'That is right. I do not know anything about it. All I know about it is that I have the warrant.' I said: 'Who am I supposed to have raped?' and he told me 'Joan De Rush'. I said 'That is unbelievable.' I could not believe it, and still cannot believe the charge was laid."

Wilfred De Long, called in reply, stated that on the night of the 19th May he had occasion to go into the accused's room to take a man up to get his lunch box, and that he saw there about a third of a bottle of rum.

With great respect to the learned trial judge, I have come to the conclusion that those aspects of the evidence herein outlined that might be considered to be corroborative, were not

properly presented to the jury. I cannot find that the evidence in regard to the blanket or the two dollars was independent evidence tending to implicate the accused. The circumstances of finding the blanket in the accused's car on the day after his arrest, and the two dollars in the complainant's pocket on the night of the alleged offence, did not connect the accused with the crime except by the evidence of the complainant. There are, however, in the conduct of the accused, proved by witnesses other than the complainant, circumstances to be found from which corroborative inferences may be drawn within the guiding principles of the law herein referred to. It is for the jury and not for this Court to decide whether such inferences ought to be drawn. It is therefore necessary that a new trial should be had, so that the corroborative features of the evidence may be properly submitted to the jury.

I would, therefore, quash the conviction and order a new trial.

New trial ordered, GILLANDERS J.A. dissenting.

Solicitor for the accused, appellant: Gordon L. Fraser, Windsor.

Solicitor for the Crown, respondent: C. L. Snyder, Deputy Attorney-General, Toronto.

[HOPE J.]

Young v. Younger et al.

Master and Servant—Negligence of Master—Knowledge by Servant—Attempted Rescue from Position of Peril—The Workmen's Compensation Act, R.S.O. 1937, c. 204, s. 121.

Motor Vehicles—Negligence—Stopping Truck in Line of Traffic.

The plaintiff was driving the truck of G, his employer, along a wide street in Toronto, where there was other traffic at the time. A passing driver called out that the rear light was dragging, and G (who was riding in the truck) insisted, despite the plaintiff's protests, upon stopping immediately. G determined to repair the light then and there, although the plaintiff protested that it was not safe to do so in the line of traffic. The plaintiff refused to help, and was returning to the door of the truck when he saw an automobile approaching from the rear, and apparently about to strike the truck. The plaintiff made an instinctive movement towards G, to save or warn him. The car which the plaintiff had seen swerved and avoided the truck, but another car immediately behind, driven by the defendant Y, struck the truck, killing G and seriously injuring the plaintiff. The plaintiff sued both Y and G's estate.

Held, both defendants were liable. As to Y, either he had been keeping an insufficient look-out or he had been driving too fast for the look-out he was able to keep. *Falsetto v. Brown et al.*, [1933] O.R. 645 at 658; *Tart v. G. W. Chitty and Company, Limited*, [1933] 2 K.B. 453 at 457, applied. G had been negligent in insisting upon stopping in the middle of the road, and the plaintiff's subsequent actions in attempting to rescue him were both natural and reasonable in the circumstances. *Seymour v. Winnipeg Electric Ry. Co.* (1910), 19 Man. R. 412, applied. The estate was not entitled, in the circumstances, to rely upon the plaintiff's knowledge of the risk. *Regal Oil & Refining Company, Limited et al. v. Campbell*, [1936] S.C.R. 309 at 313, agreeing with *Jury v. Commissioner for Railways* (1935), 53 C.L.R. 273 at 282, applied.

AN ACTION for damages. The facts are fully stated in the reasons for judgment.

30th and 31st October and 1st November 1944. The action was tried by HOPE J. without a jury at Toronto.

R. F. Wilson, K.C., and *R. Rodness*, for the plaintiff.

C. M. Milton, for the defendant Younger.

Joseph Singer, K.C., for the administrator of the Grossman estate, defendant.

8th January 1945. This is an action for damages for injuries suffered by the plaintiff as the result of an accident on Eastern Avenue in the city of Toronto on the evening of 10th September 1943, at about 8.15 o'clock.

At the time of the accident the plaintiff was a stationary engineer with regular employment. He was also an experienced and licensed motor car operator and in his spare time was casually employed by the deceased Grossman, a furniture dealer,

to drive a light half-ton truck which Grossman owned and operated in the delivery of goods.

The deceased Grossman personally did not drive a motor vehicle and was wont to have the plaintiff drive his truck to a service station from time to time for servicing and refuelling as well as for the general delivery of goods. It was, however, evident that the plaintiff had not, and apparently was not expected to have, any responsibility for the repair or condition of the truck.

Immediately prior to the accident the plaintiff, with his employer, Grossman, seated beside him, was driving the truck easterly along Eastern Avenue for the purpose of delivering some furniture. Eastern Avenue is a broad, but, in parts, curving roadway—permitting three lanes of vehicular traffic both easterly and westerly. The plaintiff was driving in the centre east-bound lane. There is some conflict in the evidence as to the density of the east-bound traffic at the time of the accident and immediately prior thereto, but despite such conflict it is clear to me that there was, indeed, some other vehicular traffic east-bound in addition to the Grossman truck. The weather was inclement with a driving rain from the south-east, resulting in low visibility.

The plaintiff testified that just before the accident the driver of a motor car which passed his truck to the left shouted to him that the rear light of the truck was dragging, and that immediately his employer, Grossman, told him, the plaintiff, to stop the truck. The plaintiff replied to Grossman that they could not or should not stop in the line of traffic. While retaining control of the steering wheel, the plaintiff opened the left door of the cab of the truck and stood upon the left running-board in an attempt to see what was wrong at the rear of the truck, but was unable to do so. The plaintiff further stated that as he did the foregoing, Grossman slid over under the steering wheel and insisted on stopping. The plaintiff, while protesting, says that he accordingly stopped and that he, the plaintiff, got out and was about to pick up the rear light assemblage, which was broken off and dragging on the ground by its wires, intending to throw it into the box of the truck, when Grossman, who had also alighted, took these parts from the plaintiff's grasp and proceeded to the rear of the truck to tie

up the broken rear light assemblage. Protesting the wisdom of this, and himself refusing to assist, the plaintiff was proceeding back to the left door of the cab of the truck when he saw a car approaching from the east and some sixty feet to the rear of the truck, and to all appearances threatening to collide with the rear of the truck. The plaintiff, in some effort to save or warn Grossman, headed back towards the rear of the truck; just then the approaching motor car veered to its left and avoided what had appeared to be an impending collision. This first motor car cleared the truck, only to reveal that it was followed at a close distance by another motor car, which proved to be that of the defendant Younger. This car, according to the plaintiff, had only one headlight burning, and it collided with the rear of the parked truck, striking Grossman fatally and also striking the plaintiff, resulting in severe bodily injuries, including fractures of both legs. From the evidence I conclude that the rear lamp of the truck, though broken and dragging, was still burning.

The defendant Younger, a retired man sixty-two years of age, while admitting the impact, claimed that he was an experienced driver, familiar with the locus, and that, with his car in second gear, he was proceeding at a rate of eight miles an hour, following the white or centre mark on the roadway; that there was no traffic on the road in his immediate vicinity; that no car was travelling ahead of him or had passed him immediately prior to the accident, and that his headlights and windshield wiper were all in perfect order. However, he did admit that as he rounded the second curve on the roadway he suddenly struck an "invisible object" on the road which he could not see out of his windshield. He further admitted that he only saw the truck on the road after he himself had gotten out of his own car after the impact. On cross-examination, Younger said that although he had his headlights on full, it was only possible for him to see fifty or sixty feet ahead of him, and that he did not think he could have seen a pedestrian at a distance of more than ten or fifteen feet ahead of him. Younger also claimed that after the accident the plaintiff had said to him that he, the plaintiff, had lost his position in the roadway, and had thought that he was nearer the curb. If this latter had been so, and the truck had in fact been nearer the south curb of the roadway, and Younger had been following the white or centre line, then the impact could not have taken place.

On his own testimony, and applying the reasoning of Davis J.A. in *Falsetto v. Brown et al.*, [1933] O.R. 645 at 658, [1933] 3 D.L.R. 545, I am of the opinion that the defendant Younger was negligent in driving even at the modest speed claimed in the circumstances existent and with his very limited range of vision.

The rule was stated as follows by Swift J. in *Tart v. G. W. Chitty and Company, Limited*, [1933] 2 K.B. 453 at 457, and approved by Arsenault J. in *McNally v. Sentner et al.* (1934), 7 M.P.R. 346 at 362 (affirmed, *sub nom. Poole & Thompson Limited v. McNally*, [1934] S.C.R. 717, [1935] 1 D.L.R. 161):

"It seems to me that when a man drives a motor car along the road, he is bound to anticipate that there may be people or animals or things in the way at any moment, and he is bound to go not faster than will permit of his stopping or deflecting his course at any time to avoid anything he sees after he has seen it. If there is any difficulty in the way of his seeing, as, for example, a fog, he must go slower in consequence. In a case like this, where a man is struck without the driver seeing him, the defendant [the driver] is in this dilemma, either he was not keeping a sufficient look-out, or if he was keeping the best look-out possible then he was going too fast for the look-out that could be kept. I really do not see how it can be said that there was no negligence in running into the back of a man. If he had had better lights or had kept a better look-out the probability is that the accident would never have happened."

In *Beaumont v. Ruddy*, [1932] O.R. 441, [1932] 3 D.L.R. 75, Masten J.A. stated:

"Generally speaking, when one car runs into another from behind, the fault is in the driving of the rear car, and the driver of the rear car must satisfy the Court that the collision did not occur as a result of his negligence."

See also *Irvine v. Metropolitan Transport Co. Ltd.*, [1933] O.R. 823, [1933] 4 D.L.R. 682.

The plaintiff's claim against the estate of his deceased employer is based upon the provisions of s. 121 of The Workmen's Compensation Act, R.S.O. 1937, c. 204, *viz.*, that in an action brought by him, the workman shall be entitled to recover from the employer the damages sustained by the workman by or in consequence of an injury where personal injury is caused to the

workman by reason of any defect in the condition of the machinery used in the business of the employer or by reason of the negligence of the employer.

Here it is alleged that the truck was defective and also that the employer was negligent in ordering the plaintiff to stop the truck in a place of danger.

May I deal with the liability of the employer on the second score only? The plaintiff admitted that he was conscious of the hazard at the time, and claimed that he protested stopping the truck where he did stop it and only did so stop it on the insistence and direct order of his employer, and that after having so stopped against his own better judgment and in compliance with the employer's order, he refused to fix the broken attachment on the road.

The defendant estate in effect raises the defence of *volenti non fit injuria*. As stated by Gillanders J.A. in the very recent judgment of our Court of Appeal in *Harrison v. Toronto Motor Car Limited and Krug*, [1945] O.R. 1, [1945] 1 D.L.R. 286, "To establish such a defence [*volenti non fit injuria*], it must be shown that the appellant [the plaintiff] not only perceived the existence of the danger, but also fully appreciated it and voluntarily assumed the risk, and this is a question of fact". *Vide* the cases therein relied upon, and also *Fairweather v. Canadian General Electric Co.* (1913), 28 O.L.R. 300, 10 D.L.R. 130.

In *Brooks, Scanlon, O'Brien Company v. Fakkema* (1911), 44 S.C.R. 412, Duff J. said:

"There is evidence again shewing that the plaintiff called attention to the danger and asked for protection. This happened the day before the accident occurred. In these circumstances it cannot be said, as a matter of law, that the plaintiff voluntarily assumed the risk of injury arising from the position in which he was placed."

The present being a claim against the estate of a deceased person, the evidence of the plaintiff requires corroboration. For that corroboration, the plaintiff relied upon the evidence of the witness Loveys. The plaintiff claimed that he had relied upon testimony to be given by another witness who was, I gather, the driver of the car which passed to the left of the plaintiff's truck and who shouted the warning to the plaintiff. The plaintiff, however, was unable to locate this witness for the trial, although he had earlier claimed (see letter written by the plaintiff's

solicitors and filed as Ex. 7 herein) that both he and his solicitor had contacted this witness in May of 1944. This, in itself, of course, is in no way helpful to the plaintiff. Without some corroborative evidence, the plaintiff's claim against the Grossman estate would fail.

Loveys is a thirty-one-year-old roofer and tinsmith, who served for three years in the armed forces, and was discharged therefrom in February of 1944. If his evidence is accepted, it would appear that on the evening of 10th September 1943 he was in Toronto and was at the time of this accident driving alone in his own motor car easterly on Eastern Avenue. It would further appear that he overtook the truck in question, passing it on its south side. As he did so he noticed that the tail light assemblage and licence plate was broken and swinging on the road. He was himself going twenty to twenty-two miles an hour, but slowed up as he passed to the south side of the truck to tell the truck driver of the broken light. As he did so he saw one man half out of the right side door of the cab of the truck and he heard this man calling to stop the truck to fix the light. The man so referred to was no doubt Grossman. At the same time as Loveys saw and heard Grossman, he also saw the driver of the truck standing on the left running-board, and he heard the driver say "We can't stop here. We're going to get hurt." After so warning the occupants of the truck, Loveys drove on and passed it. Presently he heard a crash to his rear. After hearing the crash he drove around the first block, returning to the scene of the accident, which he stated was about 500 feet east of the point where he had spoken to the truck occupants. Loveys further stated that the east-bound traffic at the time was fairly heavy and that he had noted in his mirror at least one car on the road behind him.

It was urged on behalf of the defendant Grossman that Loveys had turned up as a witness much too fortuitously and that his evidence should not be believed. It does indeed appear a fortunate thing for the plaintiff that Loveys came forward immediately preceding the trial. The manner of his doing so is therefore of interest and was as follows: Loveys swore that prior to the accident he had never met the plaintiff, nor did he have any conversation with the plaintiff at the scene of the accident, although he recognized him as having seen him on the road, bleeding profusely, following the accident. Loveys

turned sick at the sight of the blood and immediately left the scene of the accident, proceeding to his home on Booth Avenue. Another witness, a Mrs. Mitchell, who lives very close to the scene of the accident, and was evidently the first one to arrive at the scene after the accident, met Loveys but a few days before this trial and told him that a lawyer was looking for him. In this way he was brought in contact with the plaintiff, and was duly subpoenaed by the plaintiff and paid his witness fee at the time of the service. He attended in Court on the day so subpoenaed, but the case was not called and it was brought out by counsel for the defendant that after his attendance on the first day awaiting the trial, he was again paid a further day's witness fees to attend on the actual day when the case was heard. But in spite of what was suggested as more than a happy coincidence, I find that I was so impressed by the apparent honesty of this witness Loveys at the time of the trial that I then made a marginal note in my book "very good witness". Loveys did admit that the windows of his car were closed except the vent in the door to his left.

After having weighed the value of his testimony, I feel that I can accept it as truthful, and therefore as corroborative of the plaintiff's own evidence. I therefore find that despite his vocal objections and his own better judgment, the plaintiff did stop the truck on the orders of and by the direction of his deceased employer Grossman.

At the trial, counsel for the defendant estate abandoned any defence by virtue of s. 47(2) of The Highway Traffic Act, R.S.O. 1937, c. 288, which had been pleaded by way of defence.

I am of the opinion that the deceased Grossman was guilty of negligence which, combined with the negligence of the defendant Younger, brought about the injuries to the plaintiff. Notwithstanding the plaintiff's final refusal to assist in repairing the light, the plaintiff's subsequent actions in attempting to rescue his employer Grossman from a position of imminent peril were but the natural and reasonable actions in the circumstances.

As is stated by Richards J.A. in *Seymour v. Winnipeg Electric Ry. Co.* (1910), 19 Man. R. 412, 13 W.L.R. 566:

"The trend of modern legal thought is toward holding that those who risk their safety in attempting to rescue others who are put in peril by the negligence of third parties are entitled to claim compensation from such third parties for injuries they

may receive in such attempts . . . I seriously doubt whether the Supreme Court of Canada or the Judicial Committee of the Privy Council would today hold the Anderson decision [*Anderson v. The Northern Railway of Canada* (1874), 25 U.C.C.P. 301] to be good law if the fact there had been that the woman, if injured, would have had a good cause of action."

With this view I fully agree in the circumstances here present, and if a claim can be asserted against such third party, then does not the argument apply equally where, as in this case, the plaintiff risked his own safety in attempting to rescue his employer whose own negligence had placed him in a position of peril?

The defendant estate is not entitled, in my opinion, to rely upon the knowledge and assumption of the risk by the plaintiff. As is said by Duff C.J. in *Regal Oil & Refining Company, Limited et al. v. Campbell*, [1936] S.C.R. 309 at 313, [1936] 2 D.L.R. 609.

"I cannot endorse the argument that the employee can only succeed by establishing ignorance in himself and knowledge in the master. I agree with the following passage in the judgment of Rich and Dixon JJ. in *Jury v. Commissioner for Railways* (1935), 53 C.L.R. 273 at 282: 'There is no longer an independent rule demanding ignorance in the servant and knowledge in the master. But negligence in the master . . . if any there be, must be proved, and knowledge is one way but not the only way of proving it. The servant must not have consented to the consequences of the master's negligence, but his mere knowledge does not prove consent. He must not have been guilty of contributory negligence, but still less does his mere knowledge prove that he was'."

As I view the evidence, and with my understanding of the law to be as indicated, the plaintiff must succeed in his claim against both defendants for the amount of his loss. As between the defendants whose negligence contributed to the injuries, I would apportion the degree of fault, forty per cent. to the deceased Grossman and therefore to his estate, and sixty per cent. to the defendant Younger.

I have given careful consideration to the assessment of the damages sustained by the plaintiff, including his out-of-pocket expenses, his loss of earnings, his prospective earnings during a

further period of twelve months of partial disability and his pain and suffering and inconvenience, all occasioned by the injuries, and now assess them at the sum of \$4,500.

Judgment accordingly, with costs to the plaintiff.

Judgment for \$4,500 and costs.

Solicitor for the plaintiff: R. Rodness, Toronto.

Solicitor for the defendant Younger: A. J. Doane, Toronto.

Solicitors for the defendant administrator: Singer & Kert, Toronto.

[COURT OF APPEAL.]

Lambert v. The Wawanesa Mutual Insurance Company.

Insurance — Fire Insurance — Statutory Conditions — Vacancy or Non-occupancy — Material Change in Risk — The Insurance Act, R.S.O. 1937, c. 256, s. 106, stat. cons. 5(d), 7.

Where a farm house is insured "only while occupied and used exclusively as private dwelling", and the owner of the farm leaves it and goes to reside elsewhere, returning to the farm only occasionally and at irregular intervals, the house is "unoccupied" within the meaning of statutory condition 5(d), even if the owner sleeps in the house over night on some of these visits, and, if this state of affairs continues for more than thirty consecutive days without permission from the insurer, the insurance is avoided under that condition, notwithstanding the fact that at no time does a period of thirty days elapse between the owner's over-night visits. *Spahr v. North Waterloo Insurance Company* (1900), 31 O.R. 325; *Herrman v. The Adriatic Fire Insurance Company* (1881), 85 N.Y. 162, applied; *Metcalf v. General Accident Assurance Co. of Canada* (1930), 64 O.L.R. 643, distinguished; other American authorities referred to. Similarly, if the barn is also insured "only while occupied as barn", the owner's removal elsewhere will cause the barn to be unoccupied, even if farm produce and other chattels are stored therein. The occupancy of the dwelling house determines the character of the occupancy of the barn. *Continental Ins. Co. of New York v. Dunning et al.* (1933), 60 S.W. (2d) 577, agreed with. Further, even if the barn, in such circumstances, is not itself considered to be unoccupied, the non-occupancy of the dwelling house, if it continues for more than thirty consecutive days, constitutes, as to the barn, a change material to the risk within the meaning of statutory condition 7. *Wydrick v. Saltfleet and Binbrook Mutual Fire Insurance Co.* (1929), 64 O.L.R. 521, applied. (*Per* GILLANDERS and ROACH J.J.A.; McRUER J.A. dissenting).

Per curiam: The words "vacant" and "unoccupied" in statutory condition 5(d) are not synonymous.

AN APPEAL by the defendant from the judgment of Mackay J., [1944] O.W.N. 545, 11 I.L.R. 267, [1944] 4 D.L.R. 125. The facts are fully stated in the reasons for judgment.

30th November and 1st December 1944. The appeal was heard by GILLANDERS, ROACH and McRUER J.J.A.

T. J. Agar, K.C., for the defendant, appellant: We make the following submissions: (1) the plaintiff was guilty of arson;

(2) there was a change material to the risk (statutory condition 7); (3) there were wilfully false statements in the proofs of loss (statutory condition 16); (4) there was non-occupancy of the buildings for more than thirty consecutive days, in breach of statutory condition 5(d); (5) there was no evidence on which the trial judge could base any finding as to the amount of the loss; (6) under the "Special Select" clause in the policy, the maximum amount to which the plaintiff was entitled was one-half of the loss, since he has not rebuilt; (7) there was misrepresentation in the application.

1. The evidence shows that there were two separate and unconnected fires. The plaintiff had the opportunity to set them. This defence was never withdrawn, although I did say to the trial judge that it might not be necessary for him to make a definite finding on the point, because any of the other defences was sufficient for the dismissal of the action. Here the evidence clearly establishes opportunity and a powerful motive. The commission of the crime need not be shown to the exclusion of all reasonable doubt: *Italian Realty Company, Limited v. The Guardian Assurance Company, Limited et al.*, 9 M.P.R. 137, 2 I.L.R. 129, [1935] 2 D.L.R. 425.

2. If there is a change material to the risk, the condition need not exist for thirty days. Statutory condition 7 is to be distinguished in this respect from statutory condition 5(d). The application contains a statement that the buildings are owned *and occupied* by the plaintiff, and the insurance is on the buildings "only while occupied". Question 14 in the application is a continuing representation, binding on the plaintiff until the insurer has notice of a change and consents to it. [GILLANDERS J.A.: Do you say that this constitutes a condition limiting the effect of statutory condition 5(d)?] No, I submit that the plaintiff represented that he would occupy the house the year round, and that we are entitled to rely on that, quite apart from condition 5(d).

The house was broken into during the plaintiff's absence, and he knew of this, but did not notify the insurer. He says in his evidence that he was residing at Grimsby. The evidence showed that all these facts would be regarded by any reasonable insurer as material to the risk. [McRUER J.A.: Statutory condition 5(d) deals with occupancy. How can there be a change

material to the risk in respect of something expressly dealt with under another statutory condition?] Vacancy or non-occupancy is not necessarily and *per se* a change material to the risk. Here there are other factors which change the whole character of the risk—people breaking into the house, stealing, setting a fire in the stove, etc. [GILLANDERS J.A.: But does it not all flow from the lack of occupancy, which the insured has a right to continue, provided it is temporary, for thirty days?] [McRUER J.A.: I take it your argument is based on the use to which the buildings were put?] Yes, and on the fact that the plaintiff had acquired knowledge of an additional risk caused by people entering the house in his absence. The fact that there was a change material to the risk, and that we were not notified, is fatal to the plaintiff's claim: *Wydrick v. Saltfleet and Binbrook Mutual Fire Insurance Co.*, 64 O.L.R. 521, [1930] 1 D.L.R. 241; *Arcand v. Grenville Patron Mutual Fire Insurance Co.* (1923), 25 O.W.N. 175; *Kozlik v. Northern Assurance Company*, [1940] O.W.N. 21, 7 I.L.R. 43, [1940] 1 D.L.R. 710; *Kuntz v. The Niagara District Fire Insurance Co.* (1866), 16 U.C.C.P. 573.

3. The plaintiff has changed his position three times. In his proofs of loss, he claimed a total of \$2,145, in the writ the claim was \$1,650, and at the trial he abandoned \$150 (for farm produce stored in the barn) and asked for \$1,500 in all. The trial judge disallowed the claim for household contents, and awarded a total of \$1,150, without explaining how he arrived at this amount. There was a definite finding of gross exaggeration in the claim for household contents, and this should have resulted in the dismissal of the whole action. The trial judge was apparently confused as to the effect of misrepresentation. Where there is misrepresentation as to value in the application, under statutory condition 1, the effect is to vitiate the insurance as to the property in respect of which the misrepresentation is made. But under statutory condition 16, misrepresentation in the proofs of loss vitiated the entire claim: *Niedricla v. St. Lawrence Underwriters Agency of Western Assurance Co.* (1923), 53 O.L.R. 599; *Neeland v. London Mutual Fire Insurance Co. of Canada* (1923), 24 O.W.N. 563; *Leveys & Leveys Limited v. St. Paul's Insurance Co.* (1923), 25 O.W.N. 355; *Moffa v. Law Union and Rock Insurance Co.* (1924), 26 O.W.N. 88; *A. Bradshaw & Son Ltd. v. Lancashire and General Assurance Co. Ltd.* (1927), 32 O.W.N. 93.

4. The risk insured against was a typical farm risk—the farm was occupied as such by the plaintiff. The plaintiff admits that he “resided” in Grimsby after January. No one was on the farm from that time except for the plaintiff’s occasional visits, most of which were for a few hours only, in the daytime. This was not “occupancy” as contemplated by the authorities. [GILLANDERS J.A.: I suppose you say there must be occupation by a human being as his customary place of abode.] Yes: *Continental Ins. Co. of New York v. Dunning et al.* (1933), 60 S.W. (2d) 577; *American Central Ins. Co. of St. Louis, Mo. v. McHose* (1933), 66 Fed. (2d) 749; *Kinneer v. Southwestern Mut. Fire Ass’n.* (1935), 179 Atl. 800; *Nesbitt v. British Canadian Insurance Company* (1938), 5 I.L.R. 197; *Lambert v. Anglo-Scottish General Commercial Insurance Co. Ltd.*, 64 O.L.R. 439 [1930] 1 D.L.R. 284.

Not only was there a breach of the statutory condition. There was a misdescription of the risk. The plaintiff cannot succeed unless he brings himself within the description of the risk in the policy. This argument is apart from head 2 above, as to a material change; the distinction is made clear in *Renshaw v. Phoenix Insurance Company of Hartford, Conn.*, [1943] O.R. 223, 10 I.L.R. 92, [1943] 2 D.L.R. 76. For the purposes of this argument, the length of time is immaterial. If the plaintiff cannot show that at the time of the loss the risk was as described in the policy, he must fail. The copy of the application is made part of the policy, and the plaintiff, suing under the policy, adopts all the statements in it and in the application: *Holdaway v. British Crown Assurance Corporation Ltd.*, 57 O.L.R. 70, [1925] 3 D.L.R. 269; *St. Regis Pastry Shop and Baumgartner v. Continental Casualty Co.*, 63 O.L.R. 337, [1929] 1 D.L.R. 900. The statements in the application are admissions that what we undertook to insure was a building occupied the year round as a dwelling, and another building occupied as a barn.

5. The plaintiff called no witnesses, other than himself, to prove the value of his property, and the amount of the loss. The onus is on him, and this evidence is insufficient: *Welford and Otter-Barry on Fire Insurance*, 3rd ed. 1932, p. 282.

6. The “Special Select” clause, which is included in all farm policies, clearly limits the plaintiff, who did not rebuild, to one-half the amount of his loss.

7. In the application, the plaintiff placed a value of \$3,000 on his household contents. At the trial, he could not prove any

greater value than \$1,000. There is a long line of cases to the effect that this is fatal: *Neeland v. London Mutual Fire Insurance Co. of Canada* (1923), 24 O.W.N. 563; *Kiernan v. Wawanesa Mutual Insurance Company* (1940), 7 I.L.R. 249. The question "what did you pay?" contemplates the actual cash payment, not the applicant's idea of value. The plaintiff's answer to this question, in respect of the farm itself, was false. [McRUER J.A.: There is no finding in your favour on that point.] No. The fact that the defendant might have issued the same policy if the correct values had been given is immaterial: *Robins v. The Central Manufacturers Mutual Insurance Company*, [1941] O.W.N. 228, 8 I.L.R. 173; *Merchants' and Manufacturers' Insurance Co., Ltd. v. Davies*, [1937] 2 All E.R. 767.

Under statutory condition 1, a misrepresentation as to a fact material to the risk nullifies the policy "as to the property" affected thereby. In the present circumstances, this means all the property insured, because the misrepresentations go to the moral risk: *Fulton v. Wawanesa Mutual Insurance Company*, 26 Alta. L.R. 469, [1933] 1 D.L.R. 131, [1932] 3 W.W.R. 404; *Allen v. Universal Automobile Insurance Company, Limited* (1933), 45 Ll. L. Rep. 55.

H. A. F. Boyde, K.C., for the plaintiff, respondent (instructed by the Court that he need not deal with the defence of arson): The "Special Select" clause was pleaded in the statement of defence, but it is not made a ground of appeal in the notice of appeal. No point was made of it at the trial, and the trial judge accordingly did not refer to it in his reasons. If the point is still open, then it must be held that the defendant, by refusing to pay, has waived the benefit of this clause.

As to the claim for loss of produce, abandoned at the trial, it is common ground that the policy, at the time of the fire, did not cover the produce, and this claim in the proofs of loss was illusory. It is severable, and did not affect the insurer. The trial judge has not found that the "gross exaggeration" in respect of the household contents was fraudulent, and the defendant has not shown that it was wilful, as required by statutory condition 16. Also, that condition refers to wilfully false statements in connection with the particulars called for by condition 15, and the claim as to produce did not arise out of the policy sued upon.

Dealing now with the appellant's other submissions in order:

2. The wording of statutory condition 7 is important. The trial judgment should be taken as being based entirely upon the destruction of the barn. The evidence as to the value of the barn is not strong, but the defendant's agent and the plaintiff agreed upon its value, and it was totally destroyed. The non-occupation of the house is immaterial as to the risk of the barn. [GILLANDERS J.A.: Does not the question of occupancy extend to the whole premises?]

3. Statutory condition 16 was considered in *The Union Fire, Accident and General Insurance Co. of Paris v. Chatelain*, [1941] O.W.N. 347, 8 I.L.R. 340. The onus is on the insurer to show that the misstatements in the proofs of loss are wilful, and there must be clear and satisfactory proof: *Adams v. Glen Falls Insurance Co.* (1916), 37 O.L.R. 1, 31 D.L.R. 166; *Harris v. The Waterloo Mutual Fire Insurance Company* (1886), 10 O.R. 718. It is conceded that a wilfully false statement in the proofs of loss vitiates the whole claim, but this is subject to the qualification that the false statement must be in relation to one of the particulars required by statutory condition 15: *Patterson v. Oxford Farmers Mutual Fire Ins. Co.* (1912), 23 O.W.R. 122, 4 O.W.N. 140, 7 D.L.R. 369. Any misstatement, therefore, as to the number of baskets stored would not vitiate the claim, because they were not insured, and reference to them was otiose. There is no finding, and no evidence, that the claim in respect of the barn was false.

4. Statutory condition 5 does not say that the policy shall be void in the events there enumerated, and therefore the cases cited by the appellant are not applicable. The "building insured" here in question is the barn, not the house, and the only question is whether the barn was "vacant or unoccupied". The normal user of a barn of this kind, on a fruit farm, must be considered; there can be no physical occupation, but the barn can be occupied by the things in it. [GILLANDERS J.A.: It may well be argued that the barn was not vacant, but does the word "occupied" imply something further, such as constant visits by the person living on the farm?] There is no evidence as to what is to be expected as "occupation" of the barn on a fruit farm.

The evidence of the defendant's officer as to materiality, or the probability of acceptance of the risk, should not have been

admitted: *Patterson v. Oxford Farmers Mutual Fire Ins. Co.*, *supra*. It is for the Court to say whether these facts were material; the trial judge did not so find.

The question whether the premises were "vacant or unoccupied" is one of fact. Vacancy must be total, not partial or intermittent. A house cannot be said to be vacant or unoccupied if it is occupied intermittently or occasionally. The intention of the statutory condition is to avoid having an insured building closed up. The discussions in the American cases are more applicable to a city residence than to the barn on a fruit farm. [ROACH J.A.: Is not the normal use of a barn the use made of it by a person who is living in the farm house?] The two buildings are severable. The use of the barn is to be tested in respect of the use of the fruit farm. [GILLANDERS J.A.: Putting it differently, you say the use of the barn was precisely the same after the plaintiff went to live in Grimsby as it would have been if he had remained in the farm house?] Yes. [McRUER J.A.: The company particularized user with respect to particular properties. They insured this building "only while occupied as barn". They did not say "while occupied as an adjunct of an occupied dwelling house".] The policy must be construed *contra proferentem*.

3 and 7. The trial judge's language gives rise to difficulty. He has not found that there was misrepresentation or fraud in the proofs of loss, but that in the application the value of the furniture and farm produce was grossly exaggerated. There is nothing sinister about the abandonment of part of the claim at the trial: the farm produce was found not to have been insured, and that claim was accordingly dropped. No recovery was allowed in respect of the household contents, and exaggeration in respect of that, even if fraudulent (which is not found) does not assist the defendant: *Harten v. Grenville Patron Mutual Fire Insurance Company*, [1938] O.R. 500, 5 I.L.R. 87. There is no finding, or evidence, of any misrepresentation as to the barn. *Renshaw v. Phoenix Insurance Company*, *supra*, deals with the definition of the risk, rather than with material change. *Sun Insurance Office of London, England v. Roy*, [1927] S.C.R. 8, [1927] 1 D.L.R. 17, is also concerned with the description of the risk.

If the defendant is to succeed in respect of misrepresentations, either in the application or in the proofs of loss, it must establish

that they were both material and wilful. The onus of establishing wilfulness is a heavy one: *Adams v. Glen Falls Insurance Co.*, *supra*; *Earnshaw v. The Dominion of Canada General Insurance Company*, [1943] O.R. 385, 10 I.L.R. 143, [1943] 3 D.L.R. 163, 80 C.C.C. 35.

T. J. Agar, K.C., in reply: A change material to the risk need not be physical: *Wydrick v. Saltfleet and Binbrook Mutual Fire Insurance Co.*, *supra*, and cases there cited. (That case is also helpful on several other points, such as occupancy and the effect of the trial judge's findings.) There may be a change which is moral only: *Barbour v. Alliance Assurance Co.* (1927), 32 O.W.N. 86.

As to occupancy, see also *Robinson v. Briggs* (1870), L.R. 6 Ex. 1; *Boardman v. North Waterloo Insurance Company* (1899), 31 O.R. 525; *Abrahams v. The Agricultural Mutual Assurance Association* (1877), 40 U.C.Q.B. 175; *Sun Insurance Office v. Roy*, *supra*. The difference between vacancy and non-occupancy is pointed out in *Jelin v. Home Ins. Co.* (1934), 72 Fed. (2d) 326.

As to the effect of the trial judge's findings, and his failure to make findings, see *A. Bradshaw & Son Ltd. v. Lancashire and General Assurance Co. Ltd.* (1927), 32 O.W.N. 93.

There is no reason for saying that the \$1,150 was awarded entirely in respect of the barn. Evidence was given at the trial in support of a claim in respect of the house.

The test in determining the effect of a wilfully false statement in the proofs of loss is whether or not the statement relates to a claim made by the insured, not to something insured. The claim in respect of household contents was rejected by the trial judge, and shown to be false. A gross over-valuation is presumptive evidence of fraud, and the onus then shifts to the insured. [ROACH J.A.: The particulars required by statutory condition 15 do not include the value before the fire.] There must be a particular account of the loss, and this implies a statement of the value before the loss or damage: *Sokolowsky v. Fire Association of Philadelphia*, 53 B.C.R. 195, 5 I.L.R. 332, [1938] 4 D.L.R. 796, [1938] 3 W.W.R. 148; *Maple Leaf Milling Co. v. Colonial Assurance Co.*, 27 Man. R. 621, 36 D.L.R. 202, [1917] 2 W.W.R. 1091. Where the insured states the value as \$1,000, and the loss as \$120, and it appears that the \$1,000 is a fraudulent exaggeration, the whole claim is vitiated.

The plaintiff said in his application that he had no reason to anticipate incendiarism. This was a continuing representation, and when the plaintiff discovered reasons for such anticipations, he should have disclosed them: *Chapman v. Canada Accident Fire Insurance Co.* (1929), 37 O.W.N. 320.

Cur. adv. vult.

13th January 1945. GILLANDERS J.A.:—I am in agreement with the opinion of my brother Roach. I only wish to state shortly my view on the main question raised in the appeal, that is, whether or not on the facts and circumstances of this case the insured buildings or either of them were “unoccupied” for more than thirty consecutive days preceding the fire.

Two buildings on the respondent’s farm were insured—the dwelling house and the barn.

Occupancy may best be considered with relation to the dwelling house. The distinction between being occupied and unoccupied is probably more clearly apparent in the case of a dwelling, and under the circumstances here I think is decisive of the question in respect of both buildings covered by the policy of insurance under consideration.

It is first necessary to have in mind what occupancy involves as used in the fire insurance policy in question, and with relation to the subject-matter involved. One of the meanings of “occupied” given by Murray’s Dictionary is “dwelt in”. This is applicable here.

Apart from cases involving questions of the building being occupied for some other purpose or some other character, which do not arise here, a dwelling house may be said to be “occupied” while it is dwelt in, and unoccupied when no person is dwelling therein. In *Spahr v. North Waterloo Insurance Company* (1900), 31 O.R. 525, Boyd C., in considering the words “if the premises become untenanted or vacant” contained in the policy there under consideration, after concluding that “untenanted” was synonymous with “unoccupied”, says:

“... the condition imports habitual actual residence in the house and the incidental care and supervision arising therefrom in protecting the property insured.” *Vide also Abrahams v. The Agricultural Mutual Assurance Association* (1877), 40 U.C.Q.B. 175. To continue in occupation a dweller no doubt need not be there continuously. Temporary absences might not necessarily

change the occupied character of the premises, but to adopt the words of Folger C.J. in *Herrman v. The Adriatic Fire Insurance Company* (1881), 85 N.Y. 162 at 169:

"... for a dwelling house to be in a state of occupation, there must be in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage."

In the case at bar, when the respondent left his farm and took employment in the hotel at Grimsby, he changed his dwelling place from the farm house to the hotel where he worked. He still remained the owner of the farm and the buildings thereon. Considerable of his goods and chattels remained in the dwelling house, on the farm, and it might be said not to be vacant in the sense of being empty. When, however, early in January he accepted employment elsewhere and changed his usual place of abode from the dwelling on the farm to a room in the hotel where he was employed, with the intention of remaining and continuing such employment and place of abode for a period of two months or more, he left the farm dwelling house unoccupied.

No defence based on mere non-occupancy is available to the appellant unless such condition has continued for more than thirty consecutive days: *The Laurentian Insurance Company v. Davidson*, [1932] S.C.R. 491, [1932] 2 D.L.R. 750.

The fire occurred on 22nd March. Did the seven or eight somewhat irregular visits of the respondent to the farm in the interval between the time he moved to the hotel early in January and the date of the fire, have the effect of breaking the period of non-occupancy, or, considered with prior circumstances, do they support the view that the dwelling house should not be viewed as unoccupied during that period?

The occasions on which the respondent was in the farm house during that period were mere visits, and were not for the purpose or with the thought of continuing or making the farm house in any sense his regular dwelling. He says he visited the farm "at the most seven or eight times" and that he stayed overnight "about seven times". It would be unprofitable to consider what result was reached under different circumstances or under contracts containing dissimilar provisions. In my view it is sufficient to observe that the respondent, after changing his usual

place of abode from the farm to the hotel early in January, did nothing prior to the date of the fire by which it could be said that he again made the dwelling house on the farm his customary and usual place of abode. No one else was occupying the farm dwelling house, and during that period it must be viewed as unoccupied for more than thirty consecutive days preceding the fire. There might well be circumstances in other cases where some short period of real occupation breaks and divides adjacent periods of non-occupation, neither of which alone exceeds thirty consecutive days, and where the assured would be protected against avoidance of his policy by the provisions of statutory condition 5(d). The facts here do not warrant such a conclusion. They are to be distinguished from those in *Metcalfe v. General Accident Assurance Co. of Canada*, 64 O.L.R. 643, [1930] 2 D.L.R. 265.

If there were doubt or ambiguity as to the meaning, construction, or application here of the relevant provisions of statutory condition 5(d), I appreciate that it should be resolved in favour of the respondent and in maintenance and continuance of his coverage. I can find no ambiguity in the meaning of the words used, or doubt as to the result when applied to the relevant facts.

The non-occupation of the dwelling house for more than thirty consecutive days constituted, under the circumstances, non-occupation of the insured barn used in connection therewith. The dwelling and the barn were component parts of the respondent's farm property. In the circumstances here it seems clear that occupancy in respect of the barn ended when the dwelling house to which it was appurtenant became unoccupied.

The continuance of the non-occupancy for more than thirty consecutive days must, in the circumstances, be viewed as a change material to the risk. It was said by counsel for both parties that the fire which caused the loss appeared to be incendiary in origin. The respondent, in the course of his visits, had discovered that trespassers had broken into the dwelling, and the evidence he found caused apprehension in his own mind as to the danger of fire. The strong probability that the fire which caused the loss here in question resulted from the acts of trespassers in unoccupied premises seems the most convincing argument that the non-occupation became, after more than

thirty consecutive days, a change material to the risk, and indicates the importance of the supervision and protection which flows from such premises being occupied as a customary place of residence and the actual presence of those who are habitually living there.

I agree that the appeal should be allowed and the action dismissed, both with costs.

ROACH J.A.:—This is an appeal from the judgment of Mackay J., following the trial of this action without a jury at the city of Hamilton.

The plaintiff's claim is based on a policy of fire insurance issued to him by the defendant dated 18th June 1942, covering a dwelling and household contents and a barn on a farm located in the township of North Grimsby in the county of Lincoln.

The coverage provided by the policy was as follows: \$2,200 on the dwelling, \$2,700 on the household contents, and \$1,200 on the barn. The policy was for a period of three years expiring on 18th June 1945.

On 22nd March 1943 the barn and its contents were totally destroyed by fire, and the dwelling and certain household contents were damaged. There were actually two fires at the same time, one at the barn, the other in the basement of the dwelling. They were unrelated, and apparently due to incendiarism.

The learned trial judge, for reasons stated, disallowed the plaintiff's claim in respect of contents, and awarded him \$1,150 for loss of and damage to buildings.

When the plaintiff applied to the defendant's agent for insurance he signed a written application which was subsequently incorporated in and made part of the policy which was issued. In that application he applied for coverage in the amounts therein stated "on the property hereinafter described, the buildings and land being owned by Percy Lambert and occupied by owner." The property is then described as follows:—

Item A. "On building only . . . only while occupied and used exclusively as private dwelling."

Item D. "On the building, only while occupied as barn."

At the time of that application and for some months thereafter the plaintiff was actually living in the dwelling on the farm and operating the farm and in connection with such operation the barn was being put to its normal use.

Question no. 14 in the written application reads as follows:—"Will you occupy dwelling year round?" and the answer given is "Yes."

Early in January 1943, the plaintiff accepted employment at an hotel in the town of Grimsby, several miles distant from the farm, and from that time forward to the date of the fire he was actually living in that hotel, sleeping there and having his meals either in the hotel or in nearby restaurants. During that period there was no one actually living on the farm, but the plaintiff made irregular visits there. He estimated that in all he had made seven or eight such visits during that period, on seven of which occasions he remained over night in the house. On three of those occasions he discovered that in his absence the house had been broken into, and on two of such occasions some articles had been stolen. On two of these occasions whoever had broken into the dwelling had actually put fuel in the heating stove and attempted to get a fire started. On one of those three occasions the marauders had left some empty liquor or beer bottles around, indicating that they had been drinking in there. These discoveries alarmed the plaintiff. He concluded that either children or tramps had broken in. Children would not likely be drinking. The thought that marauders might set fire to the dwelling entered his mind.

The statutory conditions which, by virtue of s. 106 of The Insurance Act, R.S.C. 1937, c. 256 are deemed to be part of the contract, are, as required by that section, printed in the policy.

The relevant part of statutory condition 5 is as follows:

"Unless permission is given by the policy or endorsed thereon, the insurer shall not be liable for loss or damage occurring:

"(d) when the building insured or containing the property insured is, to the knowledge of the insured, vacant or unoccupied for more than thirty consecutive days . . ."

The permission referred to in that condition is not given by the policy or endorsed thereon. It remains to be considered, therefore, whether, by reason of the facts stated, it can be said that on the date of the fire and for more than thirty consecutive days immediately preceding the fire the dwelling which was damaged and the barn which was completely destroyed were vacant or unoccupied.

"Vacant" and "unoccupied" are not synonymous terms, but the question whether a building at any given time is vacant or unoccupied is a question of fact. The learned trial judge has found as a fact that "at no time did thirty consecutive days elapse in which the plaintiff did not spend some time on his premises", and on the footing of that finding he concluded, as a question of law, that there was no violation of statutory condition 5(d). The learned judge's finding of fact above quoted is quite justified by the evidence, but with great respect I disagree with his conclusion of law. In support of his conclusion of law he refers to *The Laurentian Insurance Company v. Davidson*, [1932] S.C.R. 491, [1932] 2 D.L.R. 750. I cannot find any assistance in that case as to what constitutes "unoccupancy". That case merely decided that any change in the risk which consisted merely in vacancy or lack of occupation for a period up to thirty consecutive days was something contemplated by the contract, but within that period was not a change material to the risk within statutory condition 7.

In my opinion, and as a result of authoritative decisions, occupancy involves more than merely spending some time in the premises which may be in question. In *Spahr v. North Waterloo Insurance Company* (1900), 31 O.R. 525, Boyd C. discussed the question. The phrase there in question was "if the premises become untenanted or vacant." He held that these words were synonymous with "unoccupied", and that "the condition imports habitual actual residence in the house and the incidental care and supervision arising therefrom in protecting the property insured," but that "absence from personal occupation for a short time, say three days, would not be fatal under such conditions." In that case the tenant had left the insured premises and gone to another house a short distance away in the same village, leaving furniture and clothes behind, and the house was without an occupant for four or five weeks before the fire. During that period the house was not abandoned or neglected: someone went there to feed pigs and chickens and water flowers in the house, and to do washing, and it was also in use for the killing of pigs, and the tenant's husband slept in it twice during that interval.

On the facts in that case the learned Chancellor concluded that the premises were unoccupied for the relevant period, and

dismissed the action. An appeal from that judgment to a Divisional Court was dismissed with costs.

In *Metcalf v. General Accident Assurance Co. of Canada*, 64 O.L.R. 643, [1930] 2 D.L.R. 265, this Court was required to consider whether or not the premises in question were "occupied as a dwelling" at the time of the fire. Masten J.A., writing the judgment of the majority of the Court, discusses the *Spahr* case, and at p. 648 says: "The decision in the *Spahr* case is not binding on this Court; but, without considering whether the legal rule there expressed ought or ought not to be in any way qualified, I am of opinion that the evidence in this case establishes as a fact that the house in question was occupied by the respondent as a dwelling at the time when the fire occurred. . . ." At p. 650 he concludes his review of the facts as follows;—"Not only was it her [the plaintiff's] dwelling, but she was occupying it continuously with all her household goods (although that of itself would not be sufficient), and she was also occupying it personally, not continuously it is true, but intermittently, habitually visiting it every other day, tending the house and airing it while she tended the flowers and fed the dog."

I am not overlooking the fact that The Insurance Act was amended in 1929. I refer to these earlier decisions only for the purpose of indicating what facts, in the opinion of other judges, would or would not constitute lack of occupation.

I am very definitely of the opinion that from the date early in January, and continuing up to the time of the fire, the house was continuously unoccupied in the sense in which that term is used in the policy; there was no person actually living in it as his habitual place of abode. The plaintiff was living at the hotel in Grimsby. That was his habitual place of abode during that period. True, he made sporadic visits to the farm, but in so doing he did not resume his habitation there. The insurer contemplated, and the policy was designed to protect, a dwelling in actual use as a place of abode or habitation. This case is a very good demonstration of the hazard of fire that attaches to dwellings in which no one is actually living, particularly in a rural area. It is the very situation against the hazard of which the defendant is protected by statutory condition 5(d).

That condition was incorporated in The Insurance Act in 1924, and there is a dearth of cases in our own courts as to

what constitutes "occupancy". There are a number of cases in the courts of some of the States of the United States where the subject is considered at length. Some of these are *Continental Ins. Co. of New York v. Dunning et al.* (1933), 60 S.W. (2d) 577; *Sternberg v. Merchants' Fire Assur. Corporation et al.* (1934), 6 Fed. Supp. 541; *Jelin v. Home Ins. Co.* (1934), 72 Fed. (2d) 326, and *Kinneer v. Southwestern Mut. Fire Ass'n.* (1935), 179 Atl. 800.

At the time of the fire, and for a period beginning in early January when the plaintiff commenced his employment in Grimsby, the barn was being used for storage purposes only. The plaintiff had stored a trailer in it, and there was a small quantity of hay and perhaps some other chattel property stored there. Was it "unoccupied" within the meaning of the policy? I think it was. I think in answering that question regard must be had to the sense in which that word is used in the policy as applicable to the barn. The language used in the policy in describing the buildings to be insured is significant. The dwelling is to be covered "only while *occupied* and *used* exclusively as private dwelling"; the barn "only while *occupied* as barn." No one "occupies" a barn in the sense that he lives in it. It is nevertheless significant that the only word of qualification in the description of the barn is "occupied". The reasoning in *Continental Ins. Co. of New York v. Dunning*, *supra*, appeals to me:

"The occupancy of a dwelling house determines the character of the occupancy of the barn and other outbuildings used in connection with it. Occupancy as it applies to such buildings implies the actual use of the dwelling place, and such use of the barn and outhouse as is ordinarily incident to the barn and outbuildings belonging to and usual in connection with the occupied dwelling, or at least something more than the use of them for mere storage. The insurer has the right by the terms of the policy to the care and supervision which are involved in such occupancy of the dwelling in connection with which the barn and other outhouses are used."

In my opinion both the dwelling and the barn were unoccupied within the meaning of that term in the policy, and for that reason the plaintiff's claim fails.

Even if it could be successfully argued that the occupancy of the barn was not to be determined by the occupancy of the

dwelling, the plaintiff's claim as it relates to the barn would still fail, because on the evidence the facts which I have stated constituted a change material to the risk within statutory condition number 7. The risk against which the insurer insured the barn was the risk of fire to the barn while the farm dwelling was occupied by the plaintiff, subject, of course, to statutory condition 5(d). The original basis for the policy was as follows:— Here was a farm with its dwelling and barn, being put to the normal use for which those buildings were intended by a farmer living on the farm and operating the farm as a going concern. That certainly was not the situation at the time of the fire, nor for more than thirty consecutive days prior to the fire.

A somewhat similar situation existed in the case of *Wydrick v. Saltfleet and Binbrook Mutual Fire Insurance Co.*, 64 O.L.R. 521, [1930] 1 D.L.R. 241. There it was held that the removal of the farm dwelling house from the neighbourhood of the barn, leaving the barn near a side road, not much travelled, and the removal of the plaintiff and his family from the farm, leaving no one actually living in the house at the time of the fire, were changes material to the risk within the meaning of a condition in the policy. Grant J.A., in delivering the judgment of this Court, says, at p. 525:

“It may also be open to question whether, upon the proper construction of the whole written contract of insurance, inasmuch as a special clause thereof contains explicit provision as to the effect of vacancy, [in the case at bar this would be statutory condition 5(d)] this should also be held to be included under the language of another condition which does not expressly mention it. However that may be, I am of opinion that the fact that no person is actually living in the house may, in combination with other material circumstances, be a factor contributing to make up, in the aggregate, such a changed situation as to be material to the risk which had been undertaken by the insurer.”

Let it be understood that the unoccupancy of the dwelling within the thirty days immediately preceding the fire is not the unoccupancy which in my opinion was a change material to the risk so far as the barn was concerned. Unoccupancy for that period was in contemplation of the parties. It is the unoccupancy beyond that period that constitutes a change material to the risk.

For these reasons I think the appeal should be allowed and the action dismissed with costs, and, of course, the appellant should have its costs of the appeal.

MCRUER J.A. (*dissenting*):—The relevant facts to be considered in this action are set forth in the judgment of my brother Roach which I have had the opportunity of reading.

The main point for decision is whether the defendants are relieved from liability under the insurance policy in question by reason of the nature of the occupancy of the premises preceding the fire. The policy purports to insure the plaintiff against loss in the amounts set out therein “on the property hereinafter described, the buildings and lands being owned by Insured and occupied by Insured situated on Lot 18, Concession 3, Township of N. Grimsby, County of Lincoln”. In the application, which is made part of the policy, the amount of the insurance on the dwelling house is said to be “\$2200 on Building only, and additions communicating therewith, including permanent fixtures, only while occupied and used exclusively as private dwelling; \$2700 on Household contents (as hereinafter defined and subject to limits specified) only while contained therein; \$1200 on the Building, only while occupied as barn”.

The following question and answer appear in the application “(14) Will you occupy dwelling year round? Yes.”

The policy contained the usual statutory conditions. The following are particularly relevant in determining the rights of the parties:

“5. Unless permission is given by the policy or endorsed thereon, the insurer shall not be liable for loss or damage occurring:

“(d) when the building insured or containing the property insured is, to the knowledge of the insured, vacant or unoccupied for more than thirty consecutive days, or being a manufacturing establishment, ceases to be operated and continues out of operation for more than thirty consecutive days.”

“7. Any change material to the risk and within the control and knowledge of the insured shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the insurer or its local agent. . . .”

Counsel for the appellant contended that when the plaintiff took employment in Grimsby under the circumstances outlined

in the evidence, the nature of the occupancy changed, and even though the premises were not in fact actually unoccupied for thirty consecutive days prior to the fire, there was a change material to the risk within the meaning of statutory condition 7. His argument was that the insuring clause defined the nature and character of the risk, namely, a risk carried on farm buildings that were owned and occupied by the insured as a going concern and that they ceased to be such when the plaintiff took employment in Grimsby. This argument might have been open for consideration on the condition of the statute law as interpreted by the decided cases prior to the amendment to The Insurance Act in 1929, and the decision in *The Laurentian Insurance Company v. Davidson*, [1932] S.C.R. 491, [1932] 2 D.L.R. 750, but I consider it is now precluded.

Section 106 of The Insurance Act, R.S.O. 1937, c. 256, provides:

“(1) The conditions set forth in this section shall be deemed to be part of every contract in force in Ontario, except contracts where the subject matter of the insurance is exclusively rents, charges or loss of profits and shall be printed on every policy with the heading ‘Statutory Conditions’ and subject to the provisions of section 110, no variation, omission or addition thereto shall be binding on the insured, nor shall anything contained in the description of the subject matter of the insurance be effective in so far as it is inconsistent with, varies, modifies or avoids any such condition.”

Section 110 is as follows:

“Where the rate of premium is affected or modified by the user, conditions, location, or maintenance of the insured property, the policy may contain a clause not inconsistent with any statutory condition setting forth any stipulation in respect of such user, condition, location or maintenance, and such clause shall not be deemed a variation of any statutory condition, and such clause shall be binding on the insured only in so far as it is held by the court before which a question relating thereto is tried to be just and reasonable.”

In my opinion it would be contrary to the provisions of s. 106 to read the insuring clause and clause 14 in the application so as in any way to cut down or vary the effect of statutory condition 5(d).

In *Laurentian Insurance Company v. Davidson*, *supra*, the insured had vacated farm buildings with no intention of returning, and had gone to the town of Newmarket to live. The insurance company was not notified of the vacancy, and a fire occurred within thirty days. Duff J., at p. 492, stated: "Where a particular matter such as vacancy or lack of occupation or cessation of industrial operation is dealt with in a contract and in a specific way in a particular clause, then the parties naturally look to that clause as containing the controlling provision in relation to the subject dealt with. I think Condition 5(d) is a declaration indicating that the parties contemplate vacancy and lack of operation during the periods mentioned as normal conditions of the risk insured against, and any change which consists merely in such vacancy or lack of occupation or cessation of operation is not a change material to the risk within the contemplation of the contract and is, therefore, not within Condition 7."

Cannon J., at p. 494, stated: "We are of opinion that, by virtue of clause (d) of condition 5 in the policy, vacancy for a period of thirty days was one of the risks contemplated by the policy, and assumed by the appellants, and that, the vacancy in question having been for less than thirty consecutive days, statutory condition no. 7 does not apply, and the appellants are liable."

In my view this decision is conclusive against the argument that there was a change material to the risk by reason of non-occupancy for any period under thirty days.

It remains to be considered whether the premises were vacant or unoccupied for more than thirty consecutive days prior to the fire. The learned trial judge's finding of fact is as follows: "... I find as a fact that at no time did thirty consecutive days elapse in which the plaintiff did not spend some time on his premises. I am of opinion that there was no violation of statutory condition No. 5(d)." As my brother Roach has pointed out, the words "vacant" and "unoccupied" are not synonymous. The premises could not be described as vacant at any relevant time. There is no doubt that they were not occupied at certain times prior to the fire, but, were they unoccupied for thirty *consecutive* days as required by the statute? The onus is on the defendant to show that they were, and the trial judge

has held on the evidence, which, I think, supports the finding, that they were not.

The evidence shows that the plaintiff, who lived alone on the farm, took employment in Grimsby for two months commencing in the early part of January 1943. He received as wages \$21 per month, and was provided with a room at the hotel at which he worked. The plaintiff's farm was operated as a fruit farm. He kept no farm stock, and naturally there would be little to do on a farm of this character during the winter months. The weather in March was bad and the plaintiff continued in his employment in Grimsby for some period longer than two months, and was so employed at the time of the fire. He maintained the furnishings in his house on the farm intact with the exception of a radio and two rugs which he removed to his room in the hotel. He returned to the farm on more or less frequent visits. His evidence was "I am there occasional weekends; I would be living there, it was still my home." He was friendly with a woman whom he took to the farm on several occasions. On some, if not all, of these occasions they stayed all night. He says that after he took employment in Grimsby he visited the farm about seven times in two months and that on these visits he stayed all night. At no time did more than a week or ten days elapse between these occasions. Counsel for the appellant contends that the visits by the plaintiff to the farm were of a character that did not constitute occupancy, and he relies on *Continental Ins. Co. of New York v. Dunning* (1933), 60 S.W. (2d) 577; *Sternberg v. Merchants' Fire Assur. Corporation et al.* (1934), 6 Fed. Supp. 541; *Jelin v. Home Ins. Co.* (1934), 72 Fed. (2d) 326; *Kinneer v. Southwestern Mut. Fire Ass'n.* (1935), 179 Atl. 800, as giving assistance in interpreting the word "unoccupied" in statutory condition 5(d). My view is that these cases can be of little assistance in interpreting words which are made part of a policy by virtue of the Ontario Insurance Act. The provision of s. 106 that "no variation, omission or addition thereto shall be binding on the insured" makes it imperative that the Court interpret the language of condition 5(d) having regard only to the words that have been used by the Legislature. It is only when the premises have been unoccupied for more than thirty *consecutive* days that the insurance becomes ineffective. When the owner of the farm was there living in the house and sleeping all night, can it

be said that on that day the dwelling house was unoccupied? If it cannot then the policy was still in effect at the time of the fire. The language of the policy, and the statutory conditions forming part of the policy, must be construed according to the well-established rules of construction, and I can see no reason to attribute to the words used any special or technical meaning. Ambiguous words of the policy should be construed liberally in favour of the insured and strictly against the insurer, in so far as they are words that are not made part of the policy by statute. In so far as they are made part of the policy by statute they should be construed to give every reasonable effect to the purpose of the statute. The purpose of statutory condition 5(d) is to prevent the avoidance of the policy by vacancy or unoccupancy, except in the cases mentioned in the condition. "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound these words in their natural and ordinary sense": *per* Lord Halsbury L.C. in *The Commissioners for Special Purposes of The Income Tax v. Pemsel*, [1891] A.C. 531 at 543. ". . . if there is nothing to modify, nothing to alter, nothing to qualify the language which the instrument contains, it must be construed in the ordinary and natural meaning of the words and sentences": *per* Lord Halsbury L.C. in *The Vestry of St. John, Hampstead v. Cotton* (1886), 12 App. Cas. 1 at 6. A statutory condition, "if there is doubt, should be held rather as amplifying than as cutting down the insurer's liability." *Curtis's and Harvey (Canada), Limited v. North British and Mercantile Insurance Company, Limited*, [1921] 1 A.C. 303 at 310, 55 D.L.R. 95, [1921] 1 W.W.R. 389, *per* Lord Dunedin.

Having these principles in mind I am of the opinion that the trial judge was right in his conclusion that the premises have not been shown to have been unoccupied for more than thirty consecutive days prior to the fire.

Counsel for the plaintiff sought to distinguish between the character of the occupancy of the barn and that of the house. In the view I have taken with respect to the occupancy of the premises it is unnecessary to consider the effect of the special language of the policy applicable to the barn. If there was no breach of statutory condition 5(d) in respect of the dwelling house there was no breach of it in respect of the barn.

In addition to the defences that I have already dealt with, counsel for the appellant relied on the following defences—Arson, wilful misrepresentation in the proofs of loss, and the provisions of the “Special Select” clause attached to the policy.

On the argument the Court intimated that the learned trial judge was right in his finding that the defence of arson had not been made out.

It was argued that the valuation of the household contents in the proofs of loss was excessive. No claim was being made for loss of the household contents, the claim being restricted to damage by water and smoke. I am not convinced that the evidence is sufficient to justify holding that there was a wilfully false statement made in respect of the valuation of the household contents.

The “Special Select” clause attached to the policy provides that in consideration of the reduced premium, the liability of the insurance company shall be limited to an amount not exceeding one-half of the cash value of the building, etc. However, if and when the insured has expended, when replacing the building destroyed by fire, a sum amounting to at least the actual loss up to the amount of insurance granted under the policy, within nine months from the date of such loss or damage, and notice of such expenditure is given in writing to the company within thirty days thereafter, the remaining one-half shall be payable within thirty days after receipt of the said notice together with interest thereon at the rate of five per cent. per annum to be calculated from sixty days after completion of the proofs of loss. It is further provided that if the insured has not replaced the building within nine months from the date of the loss, and notice to that effect is given in writing to the insured within thirty days thereafter, the company will return to the insured one-half of the premium on the policy in force at the time of the loss. It is stated that the buildings had not been rebuilt at the date of the issue of the writ, which was more than nine months after the loss. Counsel for the respondent argues that the appellant, having repudiated liability under the policy, cannot now, in case it is held that the appellant is liable, claim the benefit of the “Special Select” clause.

In my view the Court would have to re-write the contract to give effect to this argument. The terms of the contract are clear.

It was a condition precedent to the plaintiff's right to claim more than one-half of the amount of the loss that he should rebuild the insured building within nine months. His right of action is therefore limited to one-half of the amount of the loss.

I therefore hold that the appeal should be allowed and the amount awarded by the learned trial judge should be reduced by one-half, to which should be added one-half of the amount of the premium on the policy in force at the time of the fire. As success is divided, there should be no costs of the appeal. The plaintiff should have the costs of the trial.

Appeal allowed with costs and action dismissed with costs, MCRUER J.A. dissenting.

Solicitor for the plaintiff, respondent: Wilfrid R. Hobson, Hamilton.

Solicitors for the defendant, appellant: Hughes, Agar, Thompson & Amys, Toronto.

[COURT OF APPEAL.]

Beattie v. Beattie.*Divorce and Matrimonial Causes—Alimony Foundations of Cause of Action—Desertion—Cruelty.*

In an action for alimony, the plaintiff swore that, having cohabited with the defendant from 1927 until 1943, she took temporary employment as a nurse for a few days during the defendant's absence at a military camp. On the defendant's return she was in the rooms occupied by them, and he then told her that she must leave, and that he would no longer live with her or support her. There was evidence that the plaintiff, at some time, removed the furniture from the rooms theretofore occupied by the parties. The trial judge granted a nonsuit on motion of the defendant's counsel, holding that the plaintiff had left the defendant of her own accord, and that neither desertion by him nor cruelty on his part had been established.

Held (LAIDLAW J.A. dissenting), the judgment below must be reversed, and judgment must be given for the plaintiff.

Per HENDERSON J.A.: Desertion alone is sufficient foundation for an action for alimony, by reason of the breach of the marriage contract. Even if a plaintiff must establish cruelty in addition to desertion, the evidence in this case showed cruelty on the part of the defendant.

Per MCRUER J.A.: There was no evidence to justify a finding that the plaintiff "left of her own accord", or that she deserted the defendant. On the contrary, the evidence was that the defendant had turned her out of her home, and this, being done with a view to terminating the cohabitation, constituted desertion by him. *Sickert v. Sickert*, [1899] P. 278 at 282, applied. His course of conduct, particularly in view of the frail mental condition of the plaintiff, might well make out a *prima facie* case of cruelty. *H. v. H.*, [1944] O.R. 438, was distinguishable in that here the plaintiff had expressed her willingness to return to live with the defendant, if he treated her properly. A written demand for restitution of conjugal rights was not an essential preliminary to the plaintiff's right of action, particularly where, as here, there was no plea that the defendant was willing to take the plaintiff back as his wife.

Per LAIDLAW J.A. dissenting: The evidence amply supported the trial judge's findings, and these findings showed that the defendant was not living apart from the plaintiff without lawful excuse and in circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights. She had therefore not made out a *prima facie* case for alimony. *Bird v. Bird* (1923), 52 O.L.R. 1; *H. v. H.*, *supra*, applied.

Evidence—Presumptions—Validity of Marriage—Death.

Per MCRUER J.A.: Where there is evidence that a form of marriage has been gone through, and that the parties have thereafter cohabited, there is a strong presumption that the marriage was a valid one, and, in the absence of evidence to the contrary, this presumption will prevail. *Spivack v. Spivack* (1930), 99 L.J.P. 52 at 57, applied; *Sastry Velaider Aronegary et ux. v. Sembecutty Vaigalie et al.* (1881), 6 App. Cas. 364, referred to. Where a wife has been left by her husband and, although she has made all reasonable inquiries, has not heard from him in the eleven years following his disappearance, there is a presumption that the husband has died in the interval. *In re Phené's Trusts* (1869), L.R. 5 Ch. 139, referred to.

AN APPEAL by the plaintiff from the judgment of McFarland J., dismissing her action for alimony, on a motion for nonsuit made at the conclusion of the plaintiff's case. The facts are stated in the reasons for judgment.

13th December 1944. The appeal was heard by HENDERSON, LAIDLAW and MCRUER JJ.A.

Marjorie F. E. Henry, for the plaintiff, appellant: The evidence given for the plaintiff entitled her to judgment. At least there should be a new trial, the plaintiff having established a *prima facie* case, requiring an answer by the defendant; the trial judge should not have rejected the plaintiff's evidence, or granted a nonsuit.

There was desertion by the husband in 1943, and earlier cruelty, which was revived by the desertion. [LAIDLAW J.A.: Is desertion by itself a ground for alimony? In *H. v. H.*, [1944] O.R. 438, [1944] 4 D.L.R. 173 (*sub nom. Hawn v. Hawn*) I expressed the view that there must be evidence to show that the defendant was living apart from his wife without cause, and in circumstances which would entitle her, by the law of England to a decree for restitution of conjugal rights.] The defendant without cause excluded the plaintiff from the matrimonial home, and has made no offer to receive her back, although she has always been ready and willing to return to him. His wilful refusal to receive her or to support her constitutes desertion in law.

We were not required, as a condition precedent to our right to sue, to make a demand for restitution of conjugal rights, since the defendant was and is living separate and apart from the plaintiff without cause: *Weatherall v. Weatherall*, [1937] O.R. 572, [1937] 3 D.L.R. 468; *Johnson v. Johnson* (1941), 11 Fortnightly L.J. 71. It is for the defendant to offer to receive his wife back into his home: *Mason v. Mason* (1932), 41 O.W.N. 154.

D. J. Coffey, K.C., for the defendant, respondent: There is a finding of fact by the trial judge, supported by evidence. The defendant remained at the matrimonial home, and the plaintiff left it of her own free will. [HENDERSON J.A.: Where is there any evidence that the plaintiff left her home? The defendant ordered her out.] [LAIDLAW J.A.: Where is there evidence that he has just cause now for living apart from her?]

The plaintiff has not proved that she is the defendant's wife. There is no sufficient evidence that her first husband was dead when she married the defendant. [LAIDLAW J.A.: She has sworn that she was a widow.] She must prove that she is his lawful wife before she can be entitled to alimony. [MCRUER J.A.: There is a presumption against the commission of a crime. She has

sworn that she was married to the defendant.] The onus is on the plaintiff to prove strictly that she is the defendant's legal wife: *McCullough v. Ralph*, [1942] O.W.N. 80, [1942] 2 D.L.R. 389; *Ivett v. Ivett* (1930), 143 L.T. 680.

No formal demand for restitution of conjugal rights was made before this action was brought. [HENDERSON J.A.: Do you say that desertion alone is not a ground for awarding alimony?] It some circumstances it may be, but the facts of this case required a demand. [MCRUER J.A.: If the evidence discloses that the husband has ordered his wife out of the house, must she still make a demand before launching her action?] There is no evidence that the defendant would not have taken his wife back if she had offered to return. [MCRUER J.A.: The appellant's position is that the onus is on you to prove a willingness to take her back.] [LAIDLAW J.A.: *H. v. H.*, *supra*, does not deal with a demand. *Weatherall v. Weatherall*, *supra*, decided that such a demand was unnecessary. In England it is required by a rule of practice, and the English cases are therefore not applicable here.]

[MCRUER J.A.: If the plaintiff has been mentally ill, how far can the husband relieve himself of his responsibility to support her?] The evidence discloses no cruelty or misconduct whatever on the defendant's part, and the plaintiff has failed to establish her case. She has not shown that the husband would not take her back if she made a demand.

Marjorie F. E. Henry, in reply: The fact that the plaintiff is at present earning a small wage should not prejudice her right to alimony.

Cur. adv. vult.

17th January 1945. HENDERSON J.A.:—This is an appeal from a judgment of the Honourable Mr. Justice McFarland, dated 2nd October 1944, allowing a motion for nonsuit made at the close of the plaintiff's case in an action for alimony.

I retain the view which I expressed in the case of *H. v. H.*, [1944] O.R. 438, [1944] 4 D.L.R. 173 (*sub. nom. Hawn v. Hawn*), and also in *Johnston v. Johnston*, [1942] O.W.N. 47, and I repeat that actions for judicial separation and for restitution of conjugal rights have never been known in Ontario. I have always understood that a wife who is deserted by her husband has an action for alimony by reason of the breach of the marriage contract.

I think the uncontradicted evidence here shows that the defendant deserted his wife. The fact that while the defendant was at military camp the plaintiff went for a few days to nurse a sick friend cannot be evidence that the plaintiff left her home. Even if it be necessary to add cruelty to desertion, I do not know how a husband could be more cruel than by ordering his wife out of her home, telling her he did not want her any more and failing to support her, particularly in this case when the unfortunate plaintiff is in delicate mental health.

I would therefore allow the appeal with costs here and in the Court below and award the plaintiff alimony at the rate of ten dollars per week.

Since the foregoing was written, I have had the privilege of reading the opinion of my brother McRuer, and I agree that the defendant may, if he so elects within ten days from this date, have a reference as to the quantum of alimony, at his own risk as to costs.

LIDLAW J.A. (*dissenting*):—The plaintiff appeals from a judgment of McFarland J. dated 2nd October 1944, allowing a motion for nonsuit made at the close of the plaintiff's case in an action for alimony. A counterclaim for possession of certain household goods was dismissed, but there is no appeal from that part of the judgment.

The plaintiff claims to be entitled to alimony on the grounds of desertion and cruelty.

The offence of desertion was unknown to the ecclesiastical or common law: *Brookes v. Brookes* (1858), 1 Sw. & Tr. 326 at 327, 164 E.R. 750. There is no case in which a decree of alimony was granted before 1857 on the ground of desertion. The Matrimonial Causes Act 1857 (Imp.), c. 85, made "desertion without cause for two years and upwards" a matrimonial offence: s. 16. The Court was empowered on that ground, *inter alia*, to grant a decree of judicial separation or restitution of conjugal rights, and where an application was made by the wife to make any order for alimony which might be deemed just: s. 17. By s. 27 power was given to the Court to pronounce a decree dissolving a marriage, upon a wife's petition, upon the ground that "her husband has been guilty . . . of adultery coupled with desertion, without reasonable excuse, for two years or upwards."

It is apparent that The Matrimonial Causes Act 1857, *supra*, did not give to the courts in England jurisdiction to award alimony on the ground of desertion apart from proceedings for dissolution of marriage, judicial separation or restitution of conjugal rights. On the contrary, the only jurisdiction possessed by the Court either by the ecclesiastical law or by statute to grant alimony was incidental to the proceedings mentioned. In this Province the jurisdiction of the Courts to order the payment of alimony is defined by statute: see *H. v. H.*, [1944] O.R. 438, [1944] 4 D.L.R. 173 (*sub nom. Hawn v. Hawn*). Alimony may be granted to any wife who (1) would be entitled to alimony by the law of England, or (2) would be entitled, by the law of England, to a divorce and to alimony as incident thereto, or (3) to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights. A fourth class of cases may be added, *viz.*, to any wife whose husband is guilty of legal cruelty. The Court of Chancery proceeded to exercise authority in such a case after it was established in 1837, and continued thereafter to do so: *H. v. H.*, *supra*, at p. 457.

The onus is on the applicant to bring her case within the statute: *Bird v. Bird*, 52 O.L.R. 1, [1923] 1 D.L.R. 528, or to prove legal cruelty on the part of the defendant. Obviously the case does not fall within either class (1) or (2) above set forth, and inquiry need only be made to ascertain whether the plaintiff has proved that the defendant "lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights". Both requisites must be satisfied.

The learned trial judge held that the onus on the plaintiff had not been discharged: that the case failed "on the ground of non-desertion, and other phases of the matter". He found that neither desertion nor cruelty on the part of the defendant was established . . . that "his misconduct has not been shown; has not been proven in any way", and he also made a further finding that "The plaintiff left the defendant of her own accord."

Counsel for the appellant relies in particular on the following evidence in support of the allegation that the defendant deserted the plaintiff:

"Q. Will you tell his lordship why you left,—as to the conditions there? A. Mr. Beattie went over to Niagara in the soldiers, and there was a lady very ill, and they asked me if I would come down and help nurse her. And I went, for the matter of a few days. As I explained to them, I came for a few days while Mr. Beattie was over at Niagara. I didn't intend to go to do the work but I did. . . .

"Q. What happened? A. When he came back home, or was coming home, on the Saturday, I went out and brought food in for the dinner, and he told me that I was not going to cook any more food for him. I said, why? He said, he was not going to pay any rent for a roof over my head any longer. He told me he didn't want me any more. I asked him if he had another woman; or why he didn't want me. I said, 'Are you going back to Miss Nye?' And he said he couldn't stay in the rooms with me, and I couldn't stay in the rooms with him, or live there any more. So he went away all day. That was on the Saturday. And I was not able to find him then, until the following Thursday.

"Q. Where did he go? A. I don't know.

"Mr. Coffey: He was in the army.

"His Lordship: Q. Where did you go? A. I went up—

"Q. After he told you to get out, where did you go?

"A. I went down and explained to Mr. May. Mr. May said, 'Then stay here for the present, Mrs. Beattie.' But I didn't want to leave home.

"Q. Who is Mr. May? A. He lives at 40 Chestnut Park Road.

"Mrs. Henry: Q. Are you still there? A. Yes, I am still there.

"Q. What is your work there? A. Nursing, and looking after the house. Mrs. May passed away.

"Q. When did she pass away? A. Over three months ago.

"Q. How much are you paid there? A. \$10 a week."

It is plain from the evidence that there was no separation before the defendant went to military camp. But what happened during the time he was there is of the utmost importance. The circumstances appear from the evidence of Mrs. Laura Carlson, who occupied the house in which the parties also lived in a flat rented from her. I quote her evidence in part as follows:

"Q. She left while Mr. Beattie was away? A. Yes, at camp. . . .

"Q. When Mrs. Beattie left, what happened to her things, do you know? A. Well, she came one day, but nobody in the

house,—she came by herself, and took everything, she didn't leave a chair for him to sit down on, or bed, just a dirty mess."

The evidence last quoted amply supports and justifies the findings made by the learned trial judge. He was not bound to accept the evidence given by the plaintiff herself, and indeed when one reads it all the irresistible conclusion is that it is unreliable. It is unnecessary to enter into details. It may be observed, however, that the plaintiff was not frank in disclosure of facts which must have been known to her and which she swore were forgotten by her. Moreover, she emphasized at every opportunity her allegations of wrongdoing on the part of another woman and her husband, but at the same time called that woman as a witness who testified that there was no wrongdoing of any kind and no ground for any suspicion by the plaintiff.

I am satisfied that no judge or jury could judicially act upon the evidence given by the plaintiff. Moreover, no finding could reasonably be made, on the whole evidence, that the defendant was living apart from her without any sufficient cause. It follows that the judgment of nonsuit on this branch of the case was right.

There is a complete failure to establish cruelty on the part of the defendant. There is no evidence of such conduct, and that finding of the learned judge cannot be successfully challenged.

It was urged that a new trial ought to be ordered. I cannot agree. The plaintiff had full opportunity to prove her allegations and case and failed to do so. It is not suggested that more or different evidence is now available, and no error in the proceedings has been shown. The plaintiff should not be given a second hearing of the same evidence and it would be manifestly unfair to subject the defendant to the burdens of such a proceeding.

My opinion is that the appeal ought to be dismissed, but in the exercise of my discretion I would not allow any costs in this Court.

MCRUER J.A.:—This action is brought by the plaintiff against her husband to recover alimony and for a declaration as to the ownership of certain furniture situated in the premises formerly occupied by the plaintiff and defendant at Langstaff and certain other furniture stored at Joseph Robinson & Son.

In his statement of defence the defendant denies that the plaintiff contributed financially in any degree to him or to the purchasing of any property claimed by the plaintiff and counter-claims for a declaration that he was the owner of the furniture in question.

At the opening of the trial counsel for the defendant conceded the plaintiff's claim to the furniture.

The trial of the action then proceeded on the claim for alimony, and at the conclusion of the plaintiff's case counsel for the defendant moved for a nonsuit, which the learned trial judge granted.

The judgment of the Court as expressed in the formal judgment is that the action be dismissed and that the counterclaim be dismissed. From this judgment the plaintiff appeals.

It is clear on the record that the plaintiff is entitled to a declaration that she is the owner of the furniture as claimed, and the formal judgment should so provide.

A careful reading of the evidence causes one to believe that there is considerable foundation for the suggestion that the plaintiff is still in a weak mental condition, and I think justice can only be done in this case by viewing the effect of the evidence in that light.

Certain definite statements of fact are sworn to by the plaintiff, which are uncontradicted. In 1943, while they were living in the city of Toronto, on Dunfield Avenue, the defendant left home to go to military camp at Niagara. While he was away, the plaintiff says, she took temporary employment for a few days as a nurse to one Mrs. May. When her husband came back from military camp she was at home, and had cooked dinner for him. She says, "He told me that I was not going to cook any more food for him. I said, 'Why?' He said he was not going to pay rent for a roof over my head any longer. He told me he didn't want me any more . . . and he said he couldn't stay in the rooms with me and I couldn't stay in the rooms with him or live there any more."

She says she went down and explained the situation to Mr. May, where she was nursing, and he told her to remain with them for the present, and she was still there at the time of the trial, earning \$10 a week looking after the house, Mrs. May

having died in the meantime. The plaintiff further says that she went back on different occasions, and that the defendant turned her out every time she went back. She says she did not want to leave home, and when asked in cross-examination if she wanted her husband back, she said, "If my husband treated me as he should, and was not cruel to me, and treated me as a good husband, there would be no reason why I couldn't take him back."

With great respect, I cannot find anything in the evidence of Mrs. Carlson to show that the plaintiff left the defendant under any conditions other than those related in her evidence. Although Mrs. Carlson gives evidence of the removal of the furniture, she does not say when the furniture was removed, or that it was removed while the defendant was at military camp, nor does she say that the plaintiff removed the furniture when she left. In fact she indicates that the plaintiff came back at some time when no one was in the house, and removed the furniture. There is no doubt that the plaintiff went to work at Mrs. May's while her husband was at camp and that she remained there after her husband had denied her the shelter of his home. In this sense there is no doubt that she "left while her husband was at camp." As I read Mrs. Carlson's evidence it is not inconsistent with the evidence of the plaintiff. If it was a fact that the plaintiff had moved all the furniture out of the rooms while the defendant was away at military camp, this could have been established very clearly by the cross-examination of Mrs. Carlson, and since this was not done I think the interpretation I have put on Mrs. Carlson's evidence is the correct one. If I have correctly interpreted the evidence, nothing can be held against the plaintiff for removing the furniture after she was ordered from the home, as she was merely exercising her rights of ownership over property which has been conceded to her.

The learned trial judge gave no reasons for dismissing the action except to state, "The plaintiff left the defendant of her own accord, and the conditions she lays down as to going back with him are not established by the evidence, because I find that cruelty did not exist." I cannot find any evidence to support the finding that the plaintiff left of her own accord. The facts as proved, taken together with the allegation in the statement

of defence, show that the plaintiff has a history of mental illness from which she may not yet have fully recovered. She is obviously in a confused state of mind and according to her evidence she has been ordered out of her home by the defendant and told that he would not live in rooms with her. The only argument put forward in answer to this evidence was that these allegations were the result of the plaintiff's weak mental condition. There is no suggestion in the pleadings that the defendant was at any time willing to take the plaintiff back, while she said she was willing to return to her husband if he treated her as he should and was not cruel to her. The whole course of conduct on the part of the husband, as shown by the evidence, toward a woman in an admittedly frail condition of mental health, in my opinion, may well make out a *prima facie* case of cruelty. In any case I am of the opinion that the evidence shows a *prima facie* case of desertion and that the learned trial judge erred in granting a nonsuit.

I am of the opinion that the judgment of this Court in *H. v. H.*, [1944] O.R. 438, [1944] 4 D.L.R. 173 (*sub nom. Hawn v. Hawn*), does not affect the conclusion I have arrived at in this case. Kellock J.A., at p. 447, stated: "The appellant here is not in a position to show that the respondent is living apart from her without any sufficient cause when she does not desire anything but that he should live apart from her." This finding of fact appears to be the clear foundation of the decision of the Court that the wife was not entitled to alimony.

Counsel for the defendant argued that because the plaintiff has not shown that she had served the defendant with a written demand to take her back as his wife, she is not now entitled to recover alimony. I do not think that it is the law of this Province that a wife who has been consistently denied the shelter of her home without any provision for maintenance, under the circumstances shown in this case, is barred from her right of action for alimony by reason of the fact that no written demand for restitution of conjugal rights has been made prior to the commencement of the action. No such defence is pleaded, and there is no plea that the defendant is, or has been, willing to receive the plaintiff back as his wife.

It was argued by counsel for the defendant that the plaintiff deserted him by leaving his home in July 1943. I can find no

evidence that the plaintiff deserted the defendant. The mere fact that she took employment as a nurse while the defendant was at military camp does not constitute desertion, and there is no other evidence in the record to support this argument, except the evidence of Mrs. Carlson, with which I have dealt. In *Sickert v. Sickert*, [1899] P. 278 at 282, Gorell Barnes J. stated, "In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation, and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him." In the case in appeal the evidence before the Court shows that it was the husband who brought the state of cohabitation to an end.

The defendant pleads that he was not lawfully married to the plaintiff by reason of the fact that the plaintiff had been previously married, and that it has not been proved that the plaintiff's husband by that marriage is dead. The evidence shows that the plaintiff was married about the year 1904 and that her husband by that marriage disappeared in the year 1916, leaving one son. She says that she has not heard from him since he left, and that she has done everything in her power to find him. The plaintiff has proved that she went through a regular marriage ceremony with the defendant in the year 1927, and that she cohabited with him until July 1943. In the absence of any evidence to the contrary, these facts raise a strong presumption of a valid marriage. Lord Merrivale in *Spivack v. Spivack* (1930), 99 L.J.P. 52 at 57, adopts the following statement of law set out in Halsbury's Laws of England, 1st ed., vol. 16, p. 310, para. 604: "Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special licence." See also *Sastry Velaidier Aronegary et ux. v. Sembecutty Vaigalie et al.* (1881), 6 App. Cas. 364.

The only evidence adduced in support of the plea that the marriage is invalid is the evidence of the plaintiff that she was

previously married, in 1904, and that her husband had left her eleven years before her marriage to the defendant, and that she had not heard from him during that time. These facts are sufficient to raise a presumption that the plaintiff's husband by the prior marriage was dead at the time of the marriage ceremony with the defendant. "A person shown not to have been heard of for seven years by those (if any) who if he had been alive would naturally have heard of him, is presumed to be dead unless the circumstances of the case are such as to account for his not being heard of without assuming his death; but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the person who asserts it": Stephen's Digest of the Law of Evidence, 10th ed. 1922, p. 115. See also *In re Phené's Trusts* (1869), L.R. 5 Ch. 139. In my opinion the defendant has not discharged the onus upon him of proving that the marriage with the plaintiff is invalid.

There remains to be considered what disposition should be made of this appeal. Counsel for the defendant urges that if the Court is of the opinion that a *prima facie* case was made out by the plaintiff a new trial should be ordered.

The practice where a nonsuit has been granted on motion by counsel for the defendant has been well settled in our courts. In *McKee v. Fisher*, 64 O.L.R. 634 at 643, [1930] 2 D.L.R. 14, Riddell J.A. states: ". . . it has long been established practice that, when the defendant moves for a 'nonsuit', he is not permitted to have a new trial, or to adduce evidence before the appellate court; it is considered that he has elected to rest his case and his rights upon the evidence already given." This has been followed in *Neal v. The T. Eaton Co. Ltd.*, [1933] O.R. 573, [1933] 3 D.L.R. 306; *Martin v. Dibblee Construction Co. Ltd.*, [1935] O.W.N. 318, and other cases. No good reason has been advanced as to why this Court should not follow the established practice in the case in appeal.

I have, therefore, come to the conclusion that the appeal should be allowed and judgment entered for the plaintiff declaring that she is entitled to the furniture as claimed in the statement of claim and judgment should go for alimony at the rate of \$10 per week. If, however, the defendant desires a reference

as to the quantum of alimony, he should have it at his risk as to costs.

The plaintiff should have her costs of the appeal and the costs of the action.

Appeal allowed and judgment directed for the plaintiff, LAIDLAW J.A. dissenting.

Solicitor for the plaintiff, appellant: Marjorie F. E. Henry, Toronto.

Solicitors for the defendant, respondent: Coffey and McDermott, Toronto.

[COURT OF APPEAL.]

Dokuchia v. Domansch.

Negligence—Absolute Liability—Extent of Liability—Defences—Volenti non fit injuria—Conscious and Voluntary Acceptance of Risk.

Motor Vehicles—Liability of Negligent Driver—Exceptions—Persons “carried in or upon” Vehicle—The Highway Traffic Act, R.S.O. 1937, c. 288, ss. 47(1), (2), 48(1).

While the plaintiff was riding in a motor truck owned and driven by the defendant, trouble developed in the engine. At the defendant's request or direction, the plaintiff rode upon the fender and poured gasoline from a can into the carburetor. The truck started and proceeded for about a quarter of a mile, but then an explosion occurred, which threw the plaintiff on to the highway, where he was run over by the truck. He sued for damages, and the defendant, *inter alia*, relied upon s. 47(2) of The Highway Traffic Act.

Held, the defendant was liable.

Per HENDERSON and LAIDLAW JJ.A.: The *causa causans* of the plaintiff's injuries was not the motor truck, or negligence in the operation thereof, but the explosion of gasoline which was being used by the plaintiff in compliance with the defendant's request or directions. The Highway Traffic Act was therefore wholly inapplicable in the circumstances, and the defendant's liability was based upon the common law. The defendant had under his possession and control a dangerous thing, gasoline, and was responsible for all mischief resulting from the dangerous undertaking in which the plaintiff engaged at his request. *Rylands et al. v. Fletcher* (1868), L.R. 3 H.L. 330, affirming L.R. 1 Ex. 265; *Charing Cross Electricity Supply Company v. Hydraulic Power Company*, [1914] 3 K.B. 772 at 779, 785; *Powell et al. v. Fall* (1880), 5 Q.B.D. 597, applied. The maxim *volenti non fit injuria* was inapplicable, because it had not been shown that the plaintiff clearly knew and appreciated the risk, or that he voluntarily incurred it. *Canadian Pacific Railway Company v. Fréchette*, [1915] A.C. 871 at 880, applied.

Per HENDERSON and McRUER JJ.A.: Even if The Highway Traffic Act could be held to be applicable, the plaintiff was not a “person being carried in, or upon, or . . . alighting from” the motor truck within the meaning of s. 47(2), as that subsection had been construed in *Koos v. McVey*, [1937] O.R. 369.

AN APPEAL by the defendant from the judgment of Urquhart J., [1944] O.W.N. 461, [1944] 3 D.L.R. 559. The facts are fully stated in the reasons for judgment of LAIDLAW J.A.

11th December 1944. The appeal was heard by HENDERSON, LAIDLAW and MCRUER JJ.A.

F. C. Forster, for the defendant, appellant: The action should have been dismissed because of the provisions of s. 47(2) of The Highway Traffic Act, R.S.O. 1937, c. 288. The plaintiff was at all times a "person being carried in, or upon" the truck. [LAIDLAW J.A.: Could it not be said that both the plaintiff and the defendant were driving the car—that the plaintiff was part operator to make it go?] No matter what other category includes the plaintiff, he was not the driver of the truck, and *Koos v. McVey*, [1937] O.R. 369, [1937] 2 D.L.R. 496, is inapplicable. The operation of s. 47(2) is not limited to gratuitous passengers: *Bertolo v. Wyatt and Smith*, [1940] O.W.N. 1; *Poirier et al. v. Warren*, 16 M.P.R. 213, [1942] 1 D.L.R. 739. [LAIDLAW J.A.: Is there any authority for limiting the word "driver" to the man behind the wheel?]

The maxim *volenti non fit injuria* is applicable. The plaintiff must be taken to have had complete knowledge of what he was doing, and of the danger and the misfortune which might ensue: *Stewart v. Godwin*, [1933] O.W.N. 712, affirmed [1934] O.W.N. 49.

We also rely on the doctrine of joint adventure or joint control: *Karberg v. The Township of Grantham and Evans*, [1935] O.W.N. 457, [1936] 1 D.L.R. 221.

C. L. Yoerger, for the plaintiff, respondent: The plaintiff thought that he was an employee of the defendant, and bound to do what he was asked. Section 47 of The Highway Traffic Act has no application. The plaintiff was not on the motor vehicle, or alighting therefrom, when he was injured; he was on the ground and was run over. [MCRUER J.A.: Do you say that so long as he alighted upon the ground without being hurt, he does not come within the subsection?] Yes.

The plaintiff was not *volens*. He did not voluntarily assume the risk, nor did he have knowledge of it.

F. C. Forster, in reply.

18th January 1945. HENDERSON J.A.:—I have had the privilege of reading the opinions of my brethren Laidlaw and McRuer. I agree with the view expressed by my brother Laidlaw that The Highway Traffic Act has no application to this case and with his reasons for dismissing the appeal with costs.

If, however, The Highway Traffic Act does apply, then I agree with the reasons given by my brother McRuer, with the same result.

LAIDLAW J.A.:—The defendant appeals from a judgment of Urquhart J., dated 16th June 1944, after trial without a jury.

The plaintiff recovered the sum of \$4,361 damages for personal injuries after a finding that there was 80 per cent. fault on the part of the defendant and 20 per cent. fault on the part of the plaintiff, under the following circumstances:

The defendant was the owner of a motor truck. He employed the plaintiff's brother as driver. The plaintiff took his brother's place temporarily on Thursday, Friday and Saturday, 19th, 20th and 21st November 1942. On the following Monday morning, 23rd November, the defendant was driving his truck with a load of logs to Fort Frances. On the way, he called at the plaintiff's home and from there the plaintiff accompanied him in the truck. He intended to go as far as Fort Frances with the defendant and to go from there by motor bus to a place where he had been previously employed, so that he might terminate that employment and take a steady position with the defendant. After the truck had gone a short distance, the engine stalled. The defendant, who was driving, drew some gasoline from the tank of the car into a can. He poured gasoline from the can into the carburetor of the engine and with some assistance from the plaintiff succeeded in starting it. He continued to drive the truck but in a short time it stalled again. The defendant then asked the plaintiff "to take the gasoline can and get on to the front fender, and to pour the gasoline into the carburetor while the defendant drove slowly along". The plaintiff did as he was requested by the defendant and the truck was started up and driven as proposed. When it had gone about a quarter of a mile, and while the plaintiff was on the front fender pouring gasoline into the carburetor as described, an explosion occurred. The plaintiff was thrown on to the road-

way and was run over by the truck. By reason of the injuries he sustained it became necessary to amputate both of his legs.

The plaintiff claims that the injuries sustained by him were caused by negligence of the defendant "in directing the said plaintiff to undertake work which was dangerous" . . . and . . . "in striking the plaintiff while the plaintiff was standing on the ground."

The defendant contends that the plaintiff is not entitled to recover damages from him because—

(1) there is no liability on his part under s. 47(2) of The Highway Traffic Act, R.S.O. 1937, c. 288;

(2) of the application of the maxim *volenti non fit injuria*;

(3) the doctrine of joint adventure is applicable to the facts;

(4) the proximate cause of the accident was the negligence of the plaintiff himself.

The learned trial judge declined to give effect to any of the grounds of defence and made the following findings of fact, which are amply supported by evidence and accepted by me as correct:

(1) The negligence of the defendant consisted of (a) knowingly operating a defective vehicle upon the highway; (b) ordering (or even allowing) the plaintiff to get in a position of extreme danger, such as he did; (c) driving the truck with the plaintiff in that position with a dangerous substance in his hands; (d) "The result could easily have been foreseen by the defendant; the last analysis not having control over the truck."

(2) There was negligence of the plaintiff as follows: "While the plaintiff did not appreciate the risk and the danger, what he did was a very foolish thing and not being an employee he was really under no obligation to perform the act."

(3) At the time of the accident there was no "actual employment" of the plaintiff by the defendant.

(4) The defendant "knew that there was gas line trouble and that the carburetor would not fill."

(5) The defendant had had the same trouble before.

(6) The defendant had knowledge that what he asked the plaintiff to do "was a very dangerous operation."

(7) The plaintiff "had never done such a thing before" and "he did not know it was dangerous".

(8) The defendant's evidence "that it was the plaintiff's idea or suggestion that the plaintiff should assume this dangerous position, or that the plaintiff said he was taking his own chances, or something of that sort", is not to be believed.

(9) The sum of \$5,000, plus expenses of \$451.20, as claimed, ought to be allowed; the degree of fault on the part of the defendant being fixed at 80 per cent. and on the part of the plaintiff at 20 per cent., as previously stated.

The learned judge stated that the case was "fought out on a much broader basis" than presented by the pleadings, and gave leave to both parties to make amendments thereto. Under the particular circumstances, I think that course was proper.

In this court, and apparently in the court below, the case was argued on the assumption that it fell within the provisions of The Highway Traffic Act, *supra*. This premise leads to nothing but confusion and error. The Highway Traffic Act creates and imposes on the owner and driver of a motor vehicle a statutory liability. That liability is limited to loss or damage sustained by any person "by reason of negligence in the operation of such motor vehicle on a highway": s. 47(1); or, as differently stated, but with the same meaning and extent, in s. 48(1) "by reason of a motor vehicle on a highway".

The plaintiff's injuries were not caused by negligence in the operation of a motor vehicle on a highway or by reason of a motor vehicle on a highway. The motor vehicle was no doubt the instrument and object in collision with the plaintiff but the real cause—the *causa causans*—was the explosion of gasoline being used by him in compliance with the defendant's request or directions. The liability of the defendant for mischief resulting therefrom does not arise from the provisions of The Highway Traffic Act but is found in the common law. The statute has no application whatsoever to the particular circumstances of this case. The defendant had in his possession and under his control a dangerous thing, *viz.*, gasoline: see *Jefferson et al. v. Derbyshire Farmers, Limited*, [1921] 2 K.B. 281 at 290. The danger was known to the defendant and was unknown to the plaintiff. The undertaking of putting gasoline from a can into the carburetor of a defective engine was proposed by the defendant, and the law subjects him to strict responsibility for all mischief resulting therefrom. The defendant is bound to exer-

cise "a degree of diligence so stringent as to amount practically to a guarantee of safety": per Lord Macmillan in *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562 at 612. See also *Burfitt v. Kille et al.*, [1939] 2 K.B. 743 at 747; also Pollock on Torts, 14th ed. 1939, p. 386.

The rule of liability was laid down in *Fletcher v. Rylands et al.* (1866), L.R. 1 Ex. 265, affirmed, *sub nom. Rylands et al. v. Fletcher* (1868), L.R. 3 H.L. 330. The rule is not confined to liability of landowners to each other but makes the owner of the dangerous thing liable "for any mischief thereby occasioned": *Charing Cross Electricity Supply Company v. Hydraulic Power Company*, [1914] 3 K.B. 772 at 779, 785. It is not confined to cases where the dangerous thing escapes from the premises of the person keeping it. It is immaterial whether the damage is caused on or off the premises of the owner: see Pollock, *op cit.*, p. 219. The rule covers cases in which the dangerous thing is brought or carried along the highway: *Powell et al. v. Fall* (1880), 5 Q.B.D. 597.

The only excuse available at common law to the defendant is to show that the damage was caused by the plaintiff's default, or was the consequence of *vis major* or the act of God. *Fletcher v. Rylands et al.* (1866), L.R. 1 Ex. 265 at 279. Neither of these exceptions to the defendant's liability is shown in the evidence.

It remains merely to mention the various grounds of defence. Section 47(2) of The Highway Traffic Act does not exempt the defendant from liability because the provisions therein are applicable only to cases falling within the provisions of s. 47(1), *supra*. The doctrine of *volenti non fit injuria* is not applicable in any event because it was not shown that the plaintiff "clearly knew and appreciated the nature and character of the risk he ran" or that "he voluntarily incurred it": *Canadian Pacific Railway Company v. Fr  chette*, [1915] A.C. 871 at 880, 22 D.L.R. 356, 31 W.L.R. 872, 24 Que. K.B. 459, 18 C.R.C. 251.

There is no evidence whatsoever to support the argument that the plaintiff and the defendant were engaged in a joint venture. Finally, the defendant completely failed to show that the injuries sustained by the plaintiff were the result of his own negligence.

The appeal should therefore be dismissed with costs.

McRuer J.A.:—I have read with interest the judgment of my brother Laidlaw, and I agree in the result. I wish to add that I am of the opinion that even if it can be held that the plaintiff's injuries were sustained "by reason of negligence in the operation of [a] motor vehicle on a highway", the provisions of s. 47(2) of The Highway Traffic Act do not bar his right to recover damages against the defendant.

As pointed out by Macdonnell J.A. in *Koos v. McVey*, [1937] O.R. 369, [1937] 2 D.L.R. 496, this section must be strictly construed in that it cuts down the common law rights of the subject. The relevant sections of The Highway Traffic Act are interpreted as imposing certain liabilities on the owner and driver of a motor vehicle, and on the other hand in certain circumstances both the owner and the driver are declared not to be liable. The construction put on the statute was that the rights and liabilities of the owner and driver were one, in respect of other persons, namely, persons "being carried in, or upon" the motor vehicle, and that any person being "carried in, or upon" meant any person other than the owner or driver. It was therefore held that the owner, riding in a motor car, might recover for injuries sustained by reason of the negligence of the driver, notwithstanding the provisions of the section.

Interpreting the statute in the light of this decision, I do not think that the plaintiff can be said to have been a "person . . . carried in, or upon, or . . . alighting from" a motor vehicle.

It is true that for some period of time the plaintiff was a person "being carried in, or upon" the motor vehicle within the meaning of the statute, but when the defendant asked or directed the plaintiff to participate in the operation of the truck, and the plaintiff complied with the request of the defendant to assist him, he ceased to be one of those "other persons" referred to in the *Koos* case, as he was not a person who was being merely "carried in, or upon" the truck and although his duties required him to be on the truck he was not on the truck merely for the purpose of being carried. I do not think that the defendant can avail himself of the plaintiff's services in what amounted in fact to a joint operation of the truck, and at the same time claim the protection of the statute simply because the plaintiff was required to be on the truck in order to carry out the directions of the defendant.

If the words of the statute, "being carried in, or upon", do not afford the defendant protection, I do not think that the words "alighting from such motor vehicle" relieve the defendant from liability. The person contemplated by the words "alighting from such motor vehicle" is one whose action would be barred if he had been injured while "being carried in, or upon" the motor vehicle.

I am therefore of the opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, respondent: C. R. Fitch, Fort Frances.

Solicitor for the defendant, appellant: Norman L. Croome, Fort Frances.

[HOGG J.]

Eppler v. Szczepkowski.

Trusts—Mingling of Trust Funds with Trustee's Own—What Circumstances Sufficient to Establish.

Gifts—Donatio Mortis Causa—Essential Elements—Contemplation of Death—Bank Cheque.

Evidence—Corroboration—Claim against Estate of Deceased Person—Sufficiency of Corroboration—The Evidence Act, R.S.O. 1937, c. 119, s. 11.

E, shortly before his death, gave to the defendant, his sister, a cheque for \$9,000, which the defendant deposited in her own bank account before E's death. The plaintiff, E's executrix and sole beneficiary, now sought to recover this sum.

Held: (1) The evidence was insufficient to support the plaintiff's contention that the money was made up in part of moneys given to E by the plaintiff, to hold as trustee for her, which E had unlawfully mingled with his own funds. *Lupton v. White*; *White v. Lupton* (1808), 15 Ves. 432, held inapplicable; *Wilde v. Wilde* (1873), 20 Gr. 521 at 536, applied; *Brighthouse v. Morton*, [1929] S.C.R. 512 at 519, referred to. (2) The defendant had established sufficient facts to support the gift to her as a valid *donatio mortis causa*. *Wilkes v. Allington*, [1931] 2 Ch. 104; *Cain v. Moon*, [1896] 2 Q.B. 283; *Kendrick v. Dominion Bank and Bownas* (1920), 48 O.L.R. 539; *Gardner v. Parker et al.* (1818), 3 Madd. 184, and other authorities, considered. Although E had had some hope of getting better, the Court was justified in inferring that the possibility of his not recovering was present to his mind, and the gift was therefore made in contemplation of death. (3) There was, in the evidence, sufficient corroboration of the defendant's testimony to satisfy s. 11 of the Ontario Evidence Act.

AN ACTION for the recovery of \$9,000. The facts are fully stated in the reasons for judgment.

11th May and 2nd and 5th June 1944. The action was tried by HOGG J. without a jury at Toronto.

R. H. Greer, K.C., and *G. D. Watson*, for the plaintiff.

E. G. Black, K.C., for the defendant Bromislava Szczepkowski.

Grant Gordon, for the defendant Imperial Bank of Canada.

12th January 1945. HOGG J.:—This is an action in which the plaintiff alleges that a sum of \$9,000 transferred by one Peter Eppler to his sister the defendant Mrs. Szczepkowski, was money received by this defendant for the use of the said Eppler or in the alternative that the said defendant fraudulently obtained possession of the said sum and converted it to her own use. The plaintiff claims that she is entitled to this money because Eppler held it as a trustee for her, or because, in the alternative, she became entitled to it as sole beneficiary under Eppler's will.

The defendant pleads that the money in question was a *donatio mortis causa* made to her by Eppler.

The action as against the Imperial Bank of Canada was dismissed at the commencement of the trial with costs.

The facts material to the issue are as follows:

The plaintiff, who had left her husband and had lived with Eppler since the year 1931, said she had, at that time, saved, from her wages of from \$50 to \$60 a month, the sum of \$2,800, which she kept in a trunk in the room occupied by Eppler and herself. The plaintiff continued in her employment after her association with Eppler and was emphatic in stating that she had given all of her wages, earned since commencing to live with Eppler, to him. Although, both on examination for discovery and at the trial, the plaintiff testified that she did not have a bank account, it was shown that a savings account stood in her name in one of the branches in Toronto of the Imperial Bank of Canada dating from March 1934, and that deposits had been made in this account each year up to November 1943. Her explanation for the denial that she had this bank account was that the deposits in it were all made for Eppler's use and the money really belonged to him. Eppler had two bank accounts in his name in Toronto; one in a branch of the Bank of Montreal in which at one time there was a balance of slightly over \$3,000 and another in a branch of the Imperial Bank of Canada in which there was at one time slightly over \$2,000.

The plaintiff said that she and Eppler, for the sum of \$5,000, purchased an interest in a business in Toronto known as the Oak-leaf Steam Baths and that a portion of her earnings made up part of the purchase price. On 13th November 1940, there was a withdrawal of \$5,000 from Eppler's accounts in the aforesaid banks. There is no evidence how this money was used but it seems reasonable to infer that it represents the purchase price of the steam baths.

Mr. Joseph Duncan, a Toronto solicitor, testified that he had acted for the parties in connection with the purchase of the steam baths, that Eppler had a one-third interest in the business and that the plaintiff's name did not appear in the transaction.

In 1942, on the same day, the plaintiff and Eppler each made a will leaving all of whatever estate either possessed, to the other. Eppler's will mentions his interest in the steam baths. The plaintiff's will does not mention any interest in this business. The interest in the baths was sold for \$9,000, according to the plain-

tiff's testimony, apparently in October 1943, as there is a deposit in Eppler's account in the Bank of Montreal in that month, of the sum of \$9,000.

On the 5th April 1943, a house was purchased in the joint names of the plaintiff and Eppler for \$3,000. The plaintiff's evidence is that the \$2,800 cash which she had in her trunk when she commenced to live with Eppler was included in the purchase price.

It is difficult to follow the plaintiff's evidence with reference to the manner in which her wages, and those of Eppler, were dealt with. Her testimony is in some respects inconsistent, vague and confused. She said that her wages and his were put in her trunk when received and when \$200 was collected this amount was put in a bank account. However the plaintiff said that a deposit of \$470 in cash made in one of Eppler's bank accounts on the 13th November 1940 was taken from the trunk in question and was made up in part of her savings. This deposit was required to make up the full purchase price of the steam baths. The only evidence that this money was that of the plaintiff, other than her own statement, is the fact that her name was placed on the deposit slip as being the person who actually placed the money in Eppler's bank account. It may have come from the trunk in question but there is not evidence of a definite enough character to identify it as part of the plaintiff's wages.

According to the plaintiff's testimony her wages were increased to \$85 a month subsequent to 1940, but there is evidence that the plaintiff is not correct in making this assertion.

I find it difficult to give credit to the plaintiff's testimony that all of her earnings were turned over to Eppler and that the amounts representing not only the bank accounts in his name but also the account in her name, consist of the mixed earnings of herself and Eppler. It is not easy to understand, and I do not accept the plaintiff's statement that the funds in her own account were in reality deposited there for the use of Eppler.

Eppler died on the 13th January 1944, and in the application for probate of his will made to the Surrogate Court by the plaintiff as his executrix, no mention is made in the inventory of assets of the estate of the balance in the plaintiff's account in the Imperial Bank of Canada, which the plaintiff said was money belonging to Eppler. I have concluded and find that the plaintiff

had at all times the entire ownership of the funds in her bank account.

It is argued on behalf of the plaintiff that Eppler occupied the position of a trustee with respect to her money which he mixed with his own. I do not think that there can be any question of a trust having been established. The plaintiff many times said that she gave her earnings to Eppler, but there is no means by which the amount can be determined, and nowhere is there evidence that it was given to him to hold for her or that he had undertaken to keep the money separate from his own and that there was an unlawful mingling of funds.

The principle stated in *Lupton v. White*; *White v. Lupton* (1808), 15 Ves. 432, 33 E.R. 817, and the later cases, to the effect that if one undertakes to keep the property of another distinct, but mixes it with his own, the whole must be taken to be the property of the other, is not applicable, because of the facts, to the present case. It was said by Strong V.C., in *Wilde v. Wilde* (1873), 20 Gr. 521 at 536, that "a trust results where two or more persons, in determined proportions, advance the purchase money of land which is conveyed to one . . . Where, however, it is impossible to determine the proportions in which there has been contribution to price, as here, it is impossible that there can be any trust by operation of law, for the Court cannot determine the interest." See also *Brighouse v. Morton*, [1929] S.C.R. 512, [1929] 3 D.L.R. 91, the judgment of Newcombe J., at p. 519. I cannot conclude that Eppler was a trustee for any moneys which may have been given to him by the plaintiff or that she had any interest in the moneys in Eppler's bank accounts.

It was argued that a presumption of undue influence must be rebutted by the defendant but I do not think such presumption arises and there is no evidence that the plaintiff in giving her wages to Eppler, as she says she did, did not act voluntarily and deliberately and free from any influence of Eppler.

I do not think that the doctrine of improvidence can be invoked successfully. The principle discussed in *McPhail v. Maloney et al.*, [1937] O.W.N. 48 by McTague J. is not applicable to the facts in the present case.

On this branch of the case I find that the \$9,000 in question was not money held by Eppler in trust for the plaintiff and that she had no interest in this money apart from such right as she

may have under Eppler's will, subject to the disposition of the further issue in the action.

The second subject of controversy is as to whether Peter Eppler made a *donatio mortis causa* of the \$9,000 in question to the defendant a few days before his death.

Some time during the year 1943 Eppler became ill and towards the end of December of that year, Dr. William Lehto pronounced Eppler to be suffering from a malignant hypertension. This ailment had developed to a serious extent and it was suggested by the plaintiff that she and Eppler should go to the defendant Mrs. Szczepkowski's home where it would be quieter for him. In compliance with their request the defendant furnished them with a room and helped the plaintiff in taking care of Eppler. The plaintiff and Eppler moved into the defendant's home about Christmas Day of 1943, and a few days later he was taken to the Toronto General Hospital.

According to the defendant's testimony Eppler told her as soon as he was taken to her house that he wished to give her \$9,000, and asked her to get a new cheque book for him. The defendant secured such cheque book from the bank and requested a Mrs. Henrietta Fraser, for whom the defendant worked as a domestic servant, to fill out a cheque, blank so far as the signature was concerned, from the new cheque book, in the defendant's favour for \$9,000, which was done on the 5th January, the cheque being dated the 6th January. This evidence respecting the making out of the cheque is confirmed in all respects by the testimony of Mrs. Fraser. In the evening of the 6th January, the plaintiff and the defendant visited Eppler at the Hospital. He asked the plaintiff to get him a glass of water and to telephone the doctor and, according to the defendant, while the plaintiff was gone from the room Eppler signed the cheque for \$9,000, which had been filled out the day before by Mrs. Fraser.

Regarding Eppler's physical condition, the defendant said that when he was taken to the hospital on the 5th January he told her that Dr. Lehto had said he would get better. At the time Eppler signed the cheque he told the defendant, as was said by her on examination for discovery, that he did not think he was going to die, and with reference to the money, he said "When I get better you give it to me back." Dr. Lehto recognized that Eppler had a fatal illness and said that on the 5th January he

told Eppler his condition was quite serious and that he would like to have some other physician called in in consultation. Eppler remarked to Dr. Lehto that he was very ill and wished to be taken from the hospital back to his sister's house, where he thought he would get more attention. He was taken back to the defendant's home shortly after the 6th January and died there on the 13th of the same month.

The defendant took the cheque in question to Eppler's bank and had it certified on the 10th January and deposited it in her own account on the next day.

Evidence was given by the plaintiff concerning a cheque signed in blank by Eppler after he became ill and placed by the plaintiff in her trunk. This cheque was to be used in settlement of the expenses of Eppler's illness and for ordinary household charges. The plaintiff said that after Eppler's death the cheque had disappeared from the trunk, and that she used cash she had in her possession to pay the several bills. I am somewhat at a loss to understand why this story of the blank cheque was interjected into the case. There can be no question but that the cheque in favour of the defendant was not this blank cheque because of the testimony of Mrs. Fraser, which is not contradicted and which I fully accept.

It was said by Lord Tomlin in *Wilkes v. Allington*, [1931] 2 Ch. 104: "The essential conditions for a valid donatio mortis causa are stated by Lord Russell of Killowen C.J. in *Cain v. Moon*, [1896] 2 Q.B. 283, 286, where he said: 'For an effectual donatio mortis causa three things must combine: first, the gift or donation must have been in contemplation, though not necessarily in expectation of death; secondly, there must have been delivery to the donee of the subject-matter of the gift; and thirdly, the gift must be made under such circumstances as to show that the thing is to revert to the donor in case he should recover'."

In *Kendrick v. Dominion Bank and Bownas* (1920), 48 O.L.R. 539, 58 D.L.R. 309, in the Court of Appeal, Meredith C.J.O. said, referring to the judgments in *In re Beaumont*; *Beaumont v. Ewbank*, [1902] 1 Ch. 889, and *Gardner v. Parker et al.* (1818), 3 Madd. 184, 56 E.R. 478, that the Court must find that the donor intended the gift to be absolute if he died, but need not actually say so, as the inference may be drawn that the gift was

intended to be absolute, but only in case of death. See also *Wilkes v. Allington*, *supra*. If the intention is to make an absolute gift, it cannot operate as a *donatio*: *Ward v. Bradley* (1901), 1 O.L.R. 118; *Re Fanning*, 53 O.L.R. 86, [1923] 3 D.L.R. 925.

It has been held that a cheque on a bank or banker can operate as a *donatio* if it is paid before the donor's death: *Bouts v. Ellis* (1853); 17 Beav. 121, 51 E.R. 978, affirmed, 4 DeG. M. & G. 249, 43 E.R. 502; *In re Beaumont*, *supra*.

Subject to the question of corroboration of the defendant's testimony necessary under s. 11 of The Evidence Act, R.S.O. 1937, c. 119, I have reached the conclusion that there are present in the facts now under consideration the elements essential in order to create a *donatio mortis causa*. It is true that the defendant said that Eppler told her the doctor had said he would get better, and that Eppler had told her on the 6th January, the day the cheque in question was signed, that when he got better she was to give the cheque back to him. But on the same occasion and at the same time Eppler also told the defendant, according to her evidence, that he did not think he was going to die. These words signify that his mind contemplated the fact that death might be approaching. Eppler's statement that he was seriously ill, coupled with the fact that his doctor had told Eppler he wished to have some other physician called in in consultation, also tends to the belief that Eppler was aware he might not survive his illness.

In Williams on Executors, 12th ed. 1930, p. 479, the opinion is expressed that where it appears that the donation was made while the donor was ill, and only a few days or weeks before his death, it will be presumed that the gift was made in contemplation of death. This statement of the law is said to be made on the authority of *Gardner v. Parker et al.* (1818), 3 Madd. 184, 56 E.R. 478. Eppler died only seven days after the cheque was signed by him and of the disorder from which he was then suffering. *Gardner v. Parker*, does not seem to be authority for, nor support, the proposition stated in Williams. There would appear to be doubt as to whether the opinion expressed is an accurate statement of the law.

The evidence brought forward to support a *donatio* must be clear and satisfactory: *McDonald v. McDonald et al.* (1903), 33 S.C.R. 145 at 153; *Union Trust Co. Ltd. v. Wolfe*, [1934] O.W.N.

325. In *In re Reid* (1903), 6 O.L.R. 421, the headnote reads: "Any evidence which is sufficient to prove any fact against the estate of a deceased person is sufficient to prove a *donatio mortis causâ*, that is, any evidence which is believed and is corroborated as required by the statute, may be acted upon." The defendant's claim is against the estate of Peter Eppler, and the necessary corroboration required by The Evidence Act may be from circumstances or fair inferences from facts proved. The evidence of an additional witness is not essential. As I recall the matter, the question of corroboration was not discussed by counsel in argument. There are essential facts necessary to establish a *donatio* that rest on the defendant's evidence alone. She was alone with him when, she says, he stated he wished to give her \$9,000, and again when the cheque was signed at the hospital. The defendant said that the pen with which Eppler signed the cheque was lying on his bed when the plaintiff returned to the room, and that Eppler said he thought of writing to his sister. The plaintiff denies that a pen was there or in sight. On the other hand, the following circumstances must be considered in so far as they bear on corroboration. After Eppler was brought back to the defendant's home from the hospital several days before he died, Mrs. Fraser, whose evidence I have no reason whatever to doubt, said that Eppler told her the cheque in question was all right.

In the *Kendrick* case the question of the necessary corroboration required with respect to a *donatio mortis causa* is discussed. There the alleged donee had in his possession two bank pass-books of the donor, and two cheques signed by the donor, which, it was alleged, had been handed him by the donor. Meredith C.J.O., at p. 546, said: "... the possession by the respondent Bownas [the donee] of the two pass-books and the two cheques, in my opinion afford the corroboration which the statute requires. . . . any suggestion that the purpose was any other than that of making the *donatio* has no support whatever in any reasonable view of the evidence." In this case there was evidence that the donor and the donee were close friends. Hodgins J.A. dissented on the question of corroboration, and held that the pass-books and cheques could not be corroboration.

In *McDonald v. McDonald*, *supra*, it was held that there was a gift of a deposit receipt for \$6,000, and that certain cheques or orders payable out of the deposit receipt, signed by the donor just

after the handing over of the deposit receipt, were corroboration of the gift. Armour J., in a dissenting judgment, held that the cheques or orders were not in any way corroborative of a gift of the deposit receipt.

There is evidence in the case now under consideration that Eppler and the defendant had not been intimate friends for a considerable period, and that when Eppler was for some time in a hospital prior to his last illness, she had not visited him. On the other hand, the defendant took Eppler and the plaintiff into her home at once, when requested, and helped to look after his needs. There is the evidence of a friend of Eppler that at one time Eppler said he intended to leave his money to a niece, a daughter of the defendant. I do not think a great deal of weight is to be attached to this statement. There is the fact that Eppler had, by his will, bequeathed his interest in the steam baths to the plaintiff. This was, however, several years before his death, and the interest in the baths had been disposed of in the meantime.

I think that there is sufficient corroboration. The defendant's testimony seemed to me to be given frankly and without attempt to withhold the truth. Dr. Lehto's and Mrs. Fraser's evidence corroborates certain essential features, and there is the fact of the cheque which was cashed by the defendant. I have, therefore, concluded that a valid gift as a *donatio mortis causa* was made to the defendant by Eppler of the \$9,000.

The action is dismissed, and the defendant is, strictly speaking, entitled to costs, but, under the circumstances, I would suggest that costs be not demanded.

Action dismissed.

Solicitors for the plaintiff: Smith, Rae, Greer & Cartwright, Toronto.

Solicitor for the defendant Szczepkowski: E. G. Black, Toronto.

Solicitors for the defendant Imperial Bank of Canada: White, Ruel & Bristol, Toronto.

[ROACH J.]

The Town of Waterloo v. The City of Kitchener.

Municipal Corporations—Jurisdiction of Ontario Municipal Board—Private and Voluntary Agreement between Municipalities as to Operation of Street Railway—The Railway Act, R.S.O. 1937, c. 259, s. 261(1)—The Ontario Municipal Board Act, R.S.O. 1937, c. 60, s. 76.

Where two municipalities privately and voluntarily enter into an agreement for the operation, in and to one of the municipalities, of a street railway owned by the other, the agreement being in no way made in pursuance of any order of the Ontario Municipal Board, the Board has no jurisdiction to construe that agreement, or to grant the appropriate relief if there has been a breach by either party. That jurisdiction, on the contrary, is vested in the courts. *Re Toronto R. W. Co. and City of Toronto* (1918), 44 O.L.R. 381; *Toronto Corporation v. York Corporation*, [1938] A.C. 415; *Re Town of Sandwich and Sandwich Windsor and Amherstburg R.W. Co.* (1912), 2 O.W.N. 93, applied; *Town of Waterloo v. City of Berlin* (1912), 28 O.L.R. 206, distinguished.

A HEARING upon a point of law raised by the plaintiff in its statement of claim.

30th October 1944. The point was argued before ROACH J. in Weekly Court at Toronto.

J. R. Cartwright, K.C., for the plaintiff.

G. M. Bray, for the defendant.

16th January 1945. ROACH J.:—This is a motion by the defendant under Rule 122 for an order determining a point of law raised by the plaintiff in its statement of claim as follows:

"The Plaintiff raises a point of law and says that the Ontario Municipal Board has not jurisdiction to deal with the questions raised in this action or to award the relief claimed by the Plaintiff and submits that the proper forum for the determination of the matters in dispute between the parties is this Honourable Court."

In order to understand that point it is necessary briefly to state the issues.

The plaintiff's claim is based upon an alleged agreement entered into between the parties on or about the 28th day of March 1923, relating to the operation of a street railway owned and operated by either the defendant or its agent the Public Utilities Commission of the City of Kitchener, in and between the municipalities of Kitchener and Waterloo. That agreement is alleged to have remained in force for a period of twenty years. By it the defendant was granted certain rights and privileges over streets in the town of Waterloo and the defendant was to pay to the plaintiff yearly and every year on the first day of January one-quarter

of the annual net profits earned by the defendant in the operation of the railway. It is alleged that the defendant operated the said railway but that it has failed to account to and pay the plaintiff the amount to which the plaintiff was entitled under the said agreement. In particular it is alleged,

(a) that the defendant improperly charged against operating revenue payments allegedly made of principal and interest on debentures issued by the defendant;

(b) that subsequent to the parties entering into the agreement the defendant without the consent of the plaintiff purchased a railway known as the Bridgeport Street Railway and operated a branch line to Bridgeport and improperly charged against the operating revenue of the Kitchener-Waterloo Railway losses arising from the operation of the said branch line:

(c) that in 1928 the defendant received a rebate of \$15,000 for power charges which had been previously charged against operating revenue, thereby increasing the net revenue, but that the plaintiff has not been paid its one-quarter of that increase;

(d) that in the profitable years 1940, 1941 and 1942 the defendant charged against operating revenue the aggregate sum of \$38,335.80 as a reserve fund for roadway rehabilitation and that

(i) either those were not proper charges against revenue, or in the alternative

(ii) if they are proper charges they should have been deducted from revenue over the entire term of the agreement;

(e) that in certain years the defendant improperly charged the plaintiff with losses, and in other years in which there was a net profit from operations no payment was made to the plaintiff.

The plaintiff then claims:

1. A declaration that on a true and proper construction of the contract, in calculating the net profits the defendant is not entitled to charge, as against operating revenue

(a) the principal and interest on the debentures,

(b) losses arising from the operation of the Bridgeport line,

(c) the reserve fund for roadway rehabilitation.

2. A declaration that it is entitled to one-quarter of the refund of \$15,000.

3. An accounting.

4. An order directing payment of the amount found due and interest thereon.

5. Its costs.

By an application bearing date the 29th day of December 1943, the plaintiff applied to the Ontario Municipal Board for substantially the same relief as it seeks in this action. As I understand it, that application was never proceeded with beyond the filing and serving of the written application, counsel for the plaintiff having concluded that the Board had no jurisdiction.

This action was commenced by writ issued on the 24th day of August 1944. I agree that it is prudent and advisable that the question as to where the jurisdiction lies should be determined at an early stage in the action rather than delayed to the trial.

The motion came on for hearing before me on 30th October last. At that time I suggested that in view of the nature of the question in issue, namely, the question of jurisdiction, it would be advisable that the Attorneys-General for Canada and Ontario be notified so that if they or either of them so desired they might be heard. Counsel concurred in that suggestion and the motion was adjourned *sine die*. Counsel now advise me that both Attorneys-General have been notified as to the nature of the question arising on this motion and that they have each stated that they do not desire to be represented or heard.

This same point of law arose in an action between the same municipal corporations in 1912. The corporate name of the defendant in this action at that time was The Municipal Corporation of the City of Berlin and the action was based on an agreement between the parties dated 18th January 1910, covering the operation of the same street railway. In that action the plaintiff sought the same type of relief as it now seeks. That action came on for trial before the late Chancellor Boyd, who gave effect to the defendant's plea that this Court was without jurisdiction and that the jurisdiction was vested in the Ontario Railway and Municipal Board under The Ontario Railway and Municipal Board Act, 1906, 6 Ed. VII, c. 31. That decision was confirmed on an appeal by the plaintiff to the Appellate Division. See *Town of Waterloo v. City of Berlin* (1912), 28 O.L.R. 206, 12 D.L.R. 390.

The agreement now sued upon is not before me, but as a result of what was said by counsel for the plaintiff—and counsel

for the defendant did not question the accuracy of the statement—the present agreement is in no sense an extension of the original agreement which was relied upon in that earlier action. It is a new agreement entered into and functioning without the intervention in any way of the Ontario Railway and Municipal Board or its virtual successors since 1932, *The Ontario Municipal Board*: 22 Geo. V, c. 27. It therefore differs in a very important respect from the earlier agreement. That earlier agreement, to quote the late Chancellor, “was not of a voluntary character between the signatories, but was the outcome and the effective expression of terms and regulations imposed by the Ontario Railway and Municipal Board, by its order duly made on the application of Waterloo. The agreement itself was, after execution, submitted to and approved of by the same Board, as appears by its order dated the 2nd September, 1910.” The agreement now relied upon is a distinctly private and voluntary agreement.

In that earlier action it was held that the Board had jurisdiction by virtue of s. 16 of the statute which created it, and that by virtue of s. 17 such jurisdiction was exclusive original jurisdiction. Section 16 read as follows: “The Board shall have all the powers and authority vested in it by ‘*The Ontario Railway Act, 1906*,’ and shall also have full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested; (a) complaining that the company, or any person or Municipal Corporation, has failed to do any act, matter or thing required to be done by this Act or the said Act or the Special Act, or by any regulation, order or direction made thereunder, by the Lieutenant-Governor in Council, the Board, or by any inspecting engineer, or by any agreement entered into by the company with any Municipal Corporation, or has done or is doing any act, matter or thing contrary to, or in violation of, this Act, or the said Act, or the Special Act, or any such regulation, order or direction, or any such agreement”.

Section 17(3) gave the Board exclusive jurisdiction.

In *Re Town of Sandwich and Sandwich Windsor and Amherstburg R.W. Co.* (1910), 2 O.W.N. 93, 17 O.W.R. 45, it had been held that the Board was “not a Court, but an administrative body having, in connection with its primary duty, power to construe the agreements which it is called upon to enforce, but no general power such as the superior Courts possess of adjudicating

upon questions of construction in the abstract." That case was referred to by Chancellor Boyd in his judgment at the trial in *Waterloo v. Berlin*, *supra*, but he distinguished it from the case he was then trying, as would appear from certain language used by him in his judgment at p. 207, as follows: "The policy of the Legislature is, that questions such as these, between municipalities and street railways, as to their operation and mutual relations, financial or otherwise, should be exclusively dealt with by the Board specially constituted for that purpose. Once having laid hold of a matter within its jurisdiction, that Board is seized of it for all purposes of working out details of any directions given by the Board. It is for the Board to interpret and give effect to its own orders and to deal with differences arising out of those orders; and this the Legislature intends for the very purpose of expeditious and appropriate adjustment without having recourse to the intervention of the Courts."

And then, at the bottom of p. 208: "A case was cited, *Re Town of Sandwich and Sandwich Windsor and Amherstburg R.W. Co.*, [*supra*], where the question arose chiefly under a private agreement made between the litigants, as to which it was said that the Board was not a Court, and had no judicial power of adjudicating upon questions of contribution in the abstract: a proposition not pertinent to the present agreement."

The Railway Act, R.S.O. 1937, c. 259, s. 261(1), provides as follows:

"Where a railway or street railway is operated in whole or in part upon or along a highway under an agreement with a municipal corporation, and it is alleged that such agreement has been violated, the Board shall hear all matters relating to such alleged violation and shall make such order as to it may seem just, and by such order may direct the company or person operating the railway, or the municipal corporation, to do such things as the Board deems necessary for the proper fulfilment of such agreement, or to refrain from doing such acts as in its opinion constitute a violation thereof."

The Ontario Municipal Board Act, R.S.O. 1937, c. 60, s. 76, provides as follows:

"The Board shall have jurisdiction and power to,—

"(a) inquire into, hear and determine any applications made, proceedings instituted and matters brought before it under the

provisions of any general or special Act relating to railways or public utilities or any of them where by such Act any jurisdiction or power is for such purpose conferred on the Board;

“(b) hear and determine any application with respect to any railway or public utility, its construction, maintenance or operation by reason of the contravening or failure to comply on the part of any person, firm, company, corporation or municipality of or with the requirements of this or any other general or special Act, or of any regulation, rule, by-law or order made thereunder, or of any agreement entered into in relation to such railway, or public utility, its construction, maintenance or operation.”

In *Re Toronto R.W. Co. and City of Toronto* (1918), 44 O.L.R. 381, 46 D.L.R. 547, 24 C.R.C. 278 (reversed on other grounds by the Privy Council, [1920] A.C. 446, 51 D.L.R. 69, 25 C.R.C. 310, 32 C.C.C. 243, [1920] 1 W.W.R. 755), Meredith C.J.O., after referring to s. 260 of The Railway Act, R.S.O. 1914, c. 185, the language of which has not been changed in the 1937 Revised Statutes and which is now s. 261, *supra*, and to a number of sections of The Ontario Railway and Municipal Board Act, said, at p. 394: “All of these multifarious duties and powers are of an administrative character, and the only authority which is conferred upon the Board of a strictly judicial character is that of construing contracts for the purpose of exercising the administrative powers which the Board possesses, and that moreover only with respect to undertakings of a public character, subject to the jurisdiction of the Legislature of Ontario, and to contracts by municipal bodies with the undertaker or those having the conduct or management of them.”

The nature of the jurisdiction vested in the Board was later decided by the Privy Council in *Toronto Corporation v. York Corporation*, [1938] A.C. 415, [1938] 1 All E.R. 601, [1938] 1 D.L.R. 593, [1938] 1 W.W.R. 452. At p. 427 Lord Atkin, delivering the judgment of their Lordships, says: “It is difficult to avoid the conclusion that, whatever be the definition given to Court of Justice, or judicial power, the sections in question [Part III, ss. 41-46 and 54-59] do purport to clothe the Board with the functions of a Court, and to vest in it judicial powers. But, making that assumption, their Lordships are not prepared to accept the further proposition that the Board is therefore for all purposes invalidly constituted. It is primarily an administrative

body; so far as legislation has purported to give it judicial authority that attempt must fail. It is not validly constituted to receive judicial authority; so far, therefore, as the Act purports to constitute the Board a Court of Justice analogous to a Superior, District, or County Court, it is pro tanto invalid; . . . The result is that such parts of the Act as purport to vest in the Board the functions of a Court have no effect."

That judgment is decisive of the point of law here raised. The relief which the plaintiff seeks is beyond the sphere of the jurisdiction of the Board, because it does not come within the scope of the administrative functions of the Board. The matter in issue is strictly a judicial matter involving the interpretation of a private and voluntary agreement between the parties and the granting of the appropriate relief if that agreement has been breached by either of them.

Therefore the point of law here raised is decided by declaring that having regard to the matters in issue between the parties in this action the jurisdiction to try and dispose of those issues is vested in this Court.

The costs of this motion shall be costs in the cause.

Order accordingly.

Solicitors for the plaintiff: McBride and McGibbon, Waterloo.

Solicitors for the defendant: Sims, Bray, Schofield & Lohead, Kitchener.

[ROSE C.J.H.C.]

Re Taylor.

Wills—Vesting of Gifts—Life Estate to Testator's Widow, with Remainder to Children—Purpose of Testator in Postponing Distribution.

A testator left his farm property to his wife for her life, directing her, out of the rents and profits, to pay all taxes, insurance and repairs, and to apply so much of the income, if any, as remained after providing for her own maintenance towards the support, maintenance and education of the infant children. His other property was given to his executors (of whom the widow was one) to be converted and invested, with a direction to pay the income to the widow for life, and with power to apply so much of the principal as, in their discretion, might be necessary for the benefit of the children. On the death of the widow, the whole estate was to be realized, and the proceeds divided "among my children share and share alike, the children or child [of] any deceased son or daughter sons or daughters to take the share which his her or their parent would have taken had he or she survived my said wife."

Held, a share in the estate vested, at the testator's death, in each of the four children who survived him, and, one of these four children having died without issue before the widow, her share should be paid to her personal representative. *Browne v. Moody et al.*, [1936] A.C. 635, applied. It could not be said that the difference in wording between the will now under consideration and that in *Browne v. Moody* made the principle of that case inapplicable, or that distribution had been postponed for any purpose other than to allow the widow to enjoy the income.

A MOTION by the administrator with will annexed of the estate of John Taylor, deceased, for the advice and direction of the Court. The facts are fully stated in the reasons for judgment.

30th November 1944. The motion was heard by ROSE C.J.H.C. in Weekly Court at Toronto.

J. M. Bullen, K.C., for the administrator.

W. J. P. Jenner, for living daughters of the testator.

W. J. Beaton, K.C., for the administrator of the estate of a deceased daughter.

J. S. Duggan, for the son of the testator.

22nd January 1945. ROSE C.J.H.C.:—John Taylor died on March 21, 1904, leaving a will dated November 22, 1897, of which he appointed his wife and one Armstrong to be executrix and executor. The two named renounced probate, and letters of administration with the will annexed were, on March 31, 1904, granted to The National Trust Company Limited. The administrators by originating notice of motion ask for the advice and direction of the Court on a question that has arisen.

By the will the testator directs his executrix and executor to sell all his real and personal property (other than his farm

property) and after payment of his debts to invest the surplus and to pay the income therefrom to his wife for life, with power to apply from time to time so much of the principal as in their discretion may be necessary for the support, maintenance and education of his children until they arrive at the full age of twenty-one years; he gives the farm property to his wife for life, directing her out of the rents, issues and profits to pay all taxes, insurance and repairs, and to apply so much of the income, if any, as shall remain after providing for her own maintenance towards the support, maintenance and education of the children as long as they shall be under age, and unable to support themselves. He empowers his executrix and executor if they deem it advisable, to sell the farm property and invest the proceeds and to distribute the proceeds and the income therefrom in the same manner as if the property had remained unconverted. The clause that has given rise to controversy is as follows: "After the death of my said wife I direct that my said farm property and all the residue of my estate be converted into money if not then so converted, and to divide the same and all other moneys of my estate remaining unexpended among my children share and share alike, the children or child *or* any deceased son or daughter sons or daughters to take the share which his her or their parent would have taken had he or she survived my said wife." The only remaining clause is as follows: "I hereby direct that the prospective share or portion after the death of my said wife of any infant or infants and the income therefrom may be expended in whole or in part towards the support maintenance and education of such infant or infants." (The two clauses above written are copied from the original letters of administration but the case was argued as if the word "*or*" above printed in italics had been "*of*". Presumably "*of*" is the word intended to be used and I deal with the case on the assumption that there is a clerical error either in the will or in the letters of administration).

The testator was survived by his widow, his son and his three daughters. The widow died in 1943; the son and two of the daughters are still living; the other daughter, Mrs. Snook, died in 1940 without issue, and letters of administration of her estate have been issued to her husband by a court in Montana. The National Trust Company Limited, as administrators of the estate of the testator, were of opinion that Mrs. Snook's interest was a

vested one and that the administrator of her estate was entitled accordingly. The surviving daughters of the testator concurred in this proposed distribution, but the son, Walter A. Taylor, dissented. Hence this motion for advice.

My opinion is that the administrators were correctly advised. Counsel for the son contends that the principle upon which the Judicial Committee of the Privy Council acted in *Browne v. Moody et al.*, [1936] A.C. 635, [1936] 2 All E.R. 1695, [1936] O.R. 422, [1936] 4 D.L.R. 1, [1936] 3 W.W.R. 59, is inapplicable, and that the division of the estate ought to be in thirds rather than fourths. He directs attention to the fact that the language used by Mrs. *Browne* in her will is not quite the same as that used by the testator in this case, and he contends that in this case the words "the children or child of any deceased son or daughter sons or daughters to take the share which his her or their parent would have taken had he or she survived my said wife" are, having regard to the context, to be taken as "qualifying" words, not merely demonstrative as were the corresponding words in *Browne v. Moody*, and that they indicate an intention on the part of the testator that no child of the testator should take an interest unless he or she survived the widow. He contends, moreover, that the purpose of the postponement of division was in the present case different from the purpose in *Browne v. Moody*, and that it ought to be found in this case that the direction to divide on the arrival of the day fixed for division was accompanied by a condition personal to the beneficiaries and that it cannot be said that the purpose of the postponement here was to allow the widow to enjoy the income. I do not agree with this argument. The widow is given the farm to hold the same and to receive the rents, issues and profits thereof for life. Certain duties as to the use of those rents, issues and profits are imposed upon her. The first of such duties is to keep down interest on incumbrances and to pay taxes, insurance and repairs. Another is "to apply so much of such income as shall remain (if any) after her own maintenance towards the support and maintenance and education" of the children so long as they shall be under age and unable to support themselves; but it is she who is to receive the income and I do not think that it can fairly be said that the obligation cast upon her to assist the children out of any income that may remain after she has provided for her own necessities indicates that the testator postponed

distribution of the corpus because of some condition attaching to the children. The purpose, as I see it, was to provide an income for the widow out of which she could maintain herself and, if anything was left, could help the children. Similarly as to the property other than the farm property: the widow takes the income, and the fact that the income will be reduced in case she and her co-executor see fit to apply part of the capital for the benefit of the children does not appear to me to be a reason for finding that the general rule stated in *Browne v. Moody* does not apply. The answer to the question propounded will be as I have indicated.

I think that the costs of all parties to the application ought to be paid out of the estate, those of the administrators being taxed as between solicitor and client. It is true that Mr. Taylor was informed by the administrators that if he persisted in opposing their contemplated division of the residue and thus compelled them to apply to the Court and the opinion of the Court was against him they would ask that he be ordered to pay the costs, and there is something to be said for their contention that he ought to be made to bear all the expense of the motion; but although my opinion on the interpretation of the will is a decided one, I do not think that it can be said that the contention put forward by Mr. Taylor was entirely frivolous; and after all it is the failure of the testator to state his intention with perfect clearness that has given rise to the controversy and I think that the expense of obtaining the opinion of a judge may properly be considered as one of the expenses of the administration of the estate.

Order accordingly.

Solicitors for the administrator, applicant: McMaster, Montgomery & Co., Toronto.

[ROSE C.J.H.C.]

Re Simpson.

Wills—Vesting—Life Estate, followed by Gift Over—Terms of Will.

A testatrix, after creating a life estate for her daughter M, with remainder to M's children, as they attained the age of twenty-one, provided that if M should die without issue, or if any issue that survived her should fail to reach the age of twenty-one, the corpus of the fund should be divided among "the brothers and sisters and children of any deceased brother or sister of my late husband . . . the children of any such deceased brother or sister taking the share to which the parent if living would be entitled." M died without issue.

Held, the persons entitled to succeed on M's death should be ascertained as at the date of the testatrix's death, and all persons of the class referred to who were living at that date acquired a vested interest. *Browne v. Moody et al.*, [1936] A.C. 635, applied. The fact that the remaindermen were described, rather than designated by name, was not a ground for distinguishing *Browne v. Moody*. The fact that the trustee had power to advance part or all of the corpus during M's lifetime, or that of any child of hers, did not make the gift conditional or contingent, although an exercise of the power would have divested the title of the remaindermen, wholly or partly. Where a member of the class entitled had died after the testatrix but before M, that person's share should be paid to his personal representative.

Two brothers of the husband had died before the testatrix made her will, leaving children who were alive when the will was made.

Held, these children were entitled to take. The gift to them was not a substitutionary but an original one. *Re Denton* (1912), 25 O.L.R. 505, reversed 26 O.L.R. 294, considered. They took *per stirpes* and not *per capita*. Although the words "the children of any such deceased brother or sister taking the share to which the parent if living would be entitled" would not entitle them to take at all, and their right must depend upon other parts of the clause, yet it did not follow that no effect whatever should be given to those words, and it was clear, from a reading of the will, that the testatrix intended the distribution to be *per stirpes*.

A MOTION by the executor of the estate of Mary Ann Simpson, deceased, for the advice and direction of the Court. The facts are fully stated in the reasons for judgment.

23rd November 1944. The motion was heard by ROSE C.J.H.C. in Weekly Court at Toronto.

C. C. Calvin, K.C., and *W. B. Williston*, for the executors.

J. S. Denison, K.C., and *J. M. Marsh*, for the personal representatives of Margaret Harper and Mary Ann Grant and for the children of the last named.

H. N. Timmins, for the personal representatives of Peter John Simpson, deceased, and for his children.

F. W. Fisher, for the living children of John Simpson, deceased, and for the living children of Alexander Simpson, deceased.

23rd January 1945. ROSE C.J.H.C.:—The testatrix, the widow of the late Robert Simpson, died on November 6, 1907, leaving a will dated October 19, 1900, and a codicil dated February 20, 1905. Letters probate of the will and codicil were, on October 11, 1912, granted to the late Charles H. Ritchie, K.C. Mr. Ritchie died on October 3, 1916; and on November 30, 1916 letters probate were issued to the Toronto General Trusts Corporation pursuant to a direction in the will that in the event of Mr. Ritchie's death before the full execution of the trusts of the will and codicil the Corporation should be appointed in his place.

By the will, after a direction for payment of debts and funeral and testamentary expenses, the testatrix gave all her estate to the executor and trustee upon trust (after conversion of so much as should not consist of ready money) (1) to pay certain charitable bequests; (2) to pay a certain annuity to her sister for life; (3) to pay certain sums to two nephews and a niece; (4) to invest the residue of the estate and to pay the income to Margaret Merritt, daughter of the testatrix, for life and upon Mrs. Merritt's death to apply the income in and towards the support, maintenance and education of any child or children whom she might leave surviving and as each child should attain the age of twenty-one years to pay to him or her an equal share of the corpus, with this proviso: "Should my said daughter leave no issue her surviving, or none of such issue should attain the age of twenty one years, then I direct that the corpus of such residue of my estate shall belong to the brothers and sisters and children of any deceased brother or sister of my late husband Robert Simpson,—the children of any such deceased brother or sister taking the share to which the parent if living would be entitled." There was also a proviso that the trustee might, in his uncontrolled discretion, during Mrs. Merritt's lifetime, "assign, transfer and pay over to her the whole or any part or parts of such residue, or during the lifetime of any child or children of [Mrs. Merritt] apply such part or parts of such residue . . . in and towards the support, maintenance, education and advancement in life of any one or more children of" Mrs. Merritt.

By the codicil there was a gift to Mrs. Merritt of certain real estate and household and other effects. In all other respects the will was confirmed.

Mrs. Merritt, the life tenant, died on December 12, 1942, without issue.

Robert Simpson had two brothers and two sisters. The two brothers, Alexander and John, died before Mrs. Simpson made her will, each of them leaving a number of sons and daughters. One son and four daughters of Alexander are still living, and are represented here by Mr. Fisher; another son, Peter John, died after the testatrix but before Mrs. Merritt. Mr. Timmins appears for the executor of his will and for his living children. Five children of John are living; Mr. Fisher represents them also; a sixth was born and died in infancy before the making of the will. Mr. Robert Simpson's sister Margaret Harper died after the testatrix but before Mrs. Merritt. Her daughter, Mary Grant, died in 1918 (the date of her birth does not appear). Margaret Harper's personal representative as well as Mary Grant's personal representative and her three children are represented by Mr. Denison and Mr. Marsh. Mr. Robert Simpson's other sister, Helen, died in 1916, after the testatrix and before Mrs. Merritt, unmarried. So far as is known she died intestate and no grant of administration of her estate has been made.

The Trusts Corporation, as executor and trustee under the will, by originating notice, propounds certain questions. The first of them is: "As of what date are the individual members of the class of persons referred to in paragraph number four of the said will as 'the brothers and sisters and children of any deceased brother or sister of my late husband Robert Simpson,—the children of any deceased brother or sister taking the share to which the parent if living would be entitled' to be ascertained and fixed?"

Mr. Denison and Mr. Marsh for the personal representatives of Margaret Harper and her daughter and for the children of the daughter contend that the date to be taken is the death of the testatrix, and accordingly that Margaret Harper, who was living at the date of the will and at the time of the death of the testatrix, took a vested interest which, upon her death, passed to her personal representative. Mr. Fisher for the children of Alexander Simpson and John Simpson contends that the time is the death of the life tenant, Mrs. Merritt. Mr. Timmins, in this regard, supports Mr. Denison's argument.

Unless *Browne v. Moody et al.*, [1936] A.C. 635, [1936] 2 All E.R. 1695, [1936] O.R. 422, [1936] 4 D.L.R. 1, [1936] 3

W.W.R. 59, can be distinguished it is in my opinion clear that the time of vesting was the date of the death of the testatrix. There are, however, put forward some reasons for the contention that *Browne v. Moody* does not apply. One of them is that the ultimate gifts are contingent or conditional, the contingency or condition being that Mrs. Merritt shall leave no issue her surviving or that none of the surviving issue shall attain the age of twenty-one years. In this connection importance is by counsel attached to the provision that during the lifetime of Mrs. Merritt the trustee may pay over to her the whole or any part of the residue or during the lifetime of any child or children of hers may apply such part or parts of the residue as he may think proper in and towards the support, maintenance, education, and advancement in life of any one or more of her children; and another of such reasons is that in *Browne v. Moody* the remaindermen were named persons whereas in the present case they were "the brothers and sisters and children of any deceased brother or sister of . . . Robert Simpson".

It is true that in delivering the judgment of the Judicial Committee in *Browne v. Moody*, Lord Macmillan at p. 645, stated the matter thus: "But where there is a direction to pay the income of a fund to one person during his lifetime and to divide the capital among certain other named and ascertained persons on his death, even although there are no direct words of gift either of the life interest or of the capital, the rule is that vesting of the capital takes place a morte testatoris in the remaindermen." But it is to be remembered that in that case the words of the will were: "On the death of my said son, William George Hamilton Browne, I direct that the said fund . . . is to be divided as follows: One-half of the said fund to my grand-daughter Enid Browne . . . and the remainder of the said fund to be divided equally between my daughters, Florence . . . , Constance . . . , and Helen . . . " and that there was no reason why any statement should be made in the judgment as to what the result would have been if the remaindermen had been described rather than named, and as I can see no reason why in the present case the description of the remaindermen should be less effective than the naming of them I cannot believe that *Browne v. Moody* is to be held inapplicable for the reason now under discussion. Certainly in *Ross v. National Trust Company, Ltd.*, [1939] S.C.R.

276, [1939] 4 D.L.R. 653, the Supreme Court of Canada, applying the judgment of the Privy Council, took it to govern a case in which the direction for distribution after the decease of the life tenant read: "... shall divide the whole of my property held by them in Trust among all my children share and share alike."

As to the suggestion that the gift after the life estate is "contingent" or "conditional", my opinion is that, while a disposition of the property or some of it by the trustee would have been effective wholly or partly to destroy or divest the title of the remaindermen, the fact that the trustee had the power to make such disposition did not interfere with the original vesting.

For these reasons I think that the answer to the first question ought to be to the effect that vesting took place upon the death of the testatrix.

If my opinion as to the first question is correct the second question does not, in the circumstances of this case, seem to require an answer.

The fourth question is: "Are the legal personal representatives of any of the said individual members who have died since the ascertained date the proper parties to receive the share in the distribution of the corpus of the residue of the estate which would have gone to such deceased person?" The answer to this question is in the affirmative. Specifically the personal representative of Helen Simpson, if there was one, would be entitled to Helen's share.

Question 5 does not require an answer.

Question 6 is: "Does the expression 'the children of any such deceased brother or sister' include grandchildren or other issue of a deceased brother or sister of Robert Simpson?" There was no dispute on the argument as to this question. The answer obviously is "No."

Question 6(a) need not be answered and to question 6(b), "If not, then are all issue beyond children of 'a deceased brother or sister' excluded in the distribution?", the answer is "Yes."

Another question, which was argued at considerable length, is whether the living children of Alexander Simpson and of John Simpson take any interest. It is contended that the testatrix when she provided for brothers and sisters and children of any deceased brother or sister of Robert Simpson had in mind only brothers and sisters living at the time of the making of her will,

and that when she spoke of children of a deceased brother or sister she meant only of a brother or sister then alive, and consequently that as Alexander Simpson and John Simpson were then dead their children are excluded from any benefit, and that the whole of the residue went to Robert Simpson's sisters Helen Simpson and Margaret Harper. Many cases were discussed of which *Re Denton* (1912), 25 O.L.R. 505, reversed 26 O.L.R. 294, 4 D.L.R. 626; *Re Koenig*, [1939] O.R. 396, [1939] 3 D.L.R. 683, reversed [1939] O.R. 566, [1939] 4 D.L.R. 180; and *Gowling v. Thompson* (1868), 19 L.T. 242, may be mentioned. In *Re Denton* the testator gave a life interest to his wife and provided that after her death the property should be converted into money, that two pecuniary legacies should be paid, and that the remainder of the money should be divided equally amongst all his brothers and sisters share and share alike, and he added: "Should any of my brothers or sisters die before the final division of my estate leaving lawful issue then and in such case I desire that the share to which such deceased brother or sister would have been entitled if living shall be divided equally amongst the children of such deceased brother or sister so that such child or children shall take the portion to which his her or their parent would have been entitled if living." One of the sisters died before the testator and one of the questions was whether her children were entitled, under the terms of the proviso, to share in the remainder of the fund. Riddell J. came regretfully to the conclusion that, the gift to the children being substitutionary and not substantive and the children being beneficiaries out of that which the parent would have received if living, he was compelled by the authorities to hold that the children did not take. In the Divisional Court it was held that the authorities did not require such an effect to be given to the testator's language, and the children's appeal was allowed. The present case I think is much stronger. Here the gift is to the brothers and sisters and the children of any deceased brother or sister; the child (living at the date of the will) of a brother or sister then deceased is within the very words of the will; the gift to such child is, as I see it, in no sense substitutionary but is an original gift; and the child if he or she survives the testatrix acquires a vested interest. And as all the children of Alexander and John represented by Mr. Fisher were living at the date of the will and are still living I think there can

be no doubt that they are entitled. As to Alexander's son, Peter John, he survived the testatrix and I think that he acquired a vested interest which passed to the executor of his will although he died before Mrs. Merritt. As to John Simpson's daughter Helen M. Simpson, who was born and died in February 1893, long before the making of the will, there is no doubt that she took nothing.

I suppose the third question, "In what shares and proportions are the individual beneficiaries when ascertained to take?", is intended to raise the question whether the children of Alexander and John take *per capita* or *per stirpes*. As to that question, although there was some contrary suggestion by counsel, I think that on the reading of the will there is little doubt. On the cases, the children, if their title depended upon the words "the children of any such deceased brother or sister taking the share to which the parent if living would be entitled", might not be able to establish any claim, because their parents had died before the making of the will. But I do not think that it follows that, because the children do not take by reason of that provision for a substitution but as original beneficiaries, the words are to be given no effect. The testatrix's intention that if both brothers and sisters and children of a brother or sister shared they should share *per stirpes* seems to me upon any reasonable reading of the will to be apparent.

My opinion then is that the residue is to be divided into four parts, one for the children of Alexander Simpson, another for the children of John Simpson, another for the estate of Helen Simpson, and another for the estate of Margaret Harper. No person representing the estate of Helen Simpson is before the Court but in the circumstances there may well be included in the order a recital that her personal representatives were for the purpose of the motion sufficiently represented by counsel for Margaret Harper. No question is asked as to what is to be done with the share that vested in her.

The questions will be answered in accordance with the foregoing. The costs of all persons represented on the argument will be paid out of the fund.

Order accordingly.

Solicitors for the executor, applicant: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.

[ROSE C.J.H.C.]

Re Henderson.*Succession Duties—Payment out of Estate—Sufficiency of Direction in Will.*

A testator, by his will, directed his executors to pay from and out of the estate all debts, funeral and testamentary expenses, "as well as succession duties, if any, which [might] be assessable or chargeable against any gift, devise or legacy [therein] contained." He bequeathed to his wife shares of mining stocks, a summer residence with its furnishings, and a motor car. He then gave "my estate, real and personal, of every nature and kind" to his executors, upon the following trusts: (1) to convert everything except some shares in a publishing company; (2) to pay \$21,500 to the testator's widow, and thereafter to pay, from the balance, four other pecuniary legacies. By the next clause, 3, he directed his executors to distribute his shares in the publishing company among his three sons, and by clause 4 he directed them to distribute all the rest and residue of the estate among his three sons in equal shares.

Held, the testator had sufficiently indicated an intention that succession duties on all benefits conferred by the will should be paid out of the "estate" which he gave to his executors, *i.e.*, the proceeds of the conversion of all of his estate except what he had already specifically given to the widow. *Re Patterson*, [1943] O.W.N. 736, considered and distinguished. The executors should therefore pay, out of the residuary estate, the succession duties chargeable in respect of the specific bequests to the widow, the pecuniary legacies, and the shares in the publishing company. There was, however, no direction to them to pay succession duties on gifts *inter vivos*.

A MOTION by the executors of the estate of Gideon Eugene Henderson, deceased, for the advice and direction of the Court. The facts are stated in the reasons for judgment.

18th December 1944. The motion was heard by ROSE C.J.H.C. in Weekly Court at Toronto.

A. A. Macdonald, K.C., for the executors.

G. A. Gale, for the widow.

G. T. Evans, for Fred Cecil Henderson and Rexford Eugene Henderson.

29th January 1945. ROSE C.J.H.C.: The testator died in December 1942, leaving a will dated May 15, 1937, and a codicil dated October 14, 1941, which will and codicil were admitted to probate on April 12, 1943.

By the will the testator directed his executors to pay from and out of his estate all his debts, funeral and testamentary expenses, "as well as succession duties, if any, which [might] be assessable or chargeable against any gift, devise or legacy [therein] contained." Then he gave, devised and bequeathed to his wife certain shares of mining stocks, a summer residence together with the furnishings and a boat and a motor car, and a certain mortgage;

and he proceeded as follows: "I give, devise and bequeath my estate, real and personal, of every nature and kind wheresoever situated, or over which I have any power or appointment, to my executors, to be held upon" certain trusts. The trusts were (1) to convert into money all of his estate which might not consist of ready money (excepting his shares in a certain publishing company); (2) upon such realization or so much of such realization as might be necessary, to pay to his wife twenty-one thousand five hundred dollars and after such amount had been duly paid in full to pay from the balance four pecuniary bequests, one of them a bequest of nine thousand dollars to his son Fred Cecil Henderson and another a bequest of nine thousand dollars to his son Rexford Eugene Henderson. By the next numbered clause, no. 3, he bequeathed and directed his executors to distribute his shares in the capital stock of the publishing company amongst his three sons, and by the next clause, 4, he directed his executors to distribute all the rest and residue of his estate amongst his three sons in equal shares. By the codicil he provided: "In case I shall have disposed of the said Mortgage [*i.e.*, the mortgage in the will given to his wife] or in case it shall have been paid off so that it does not form part of my estate at my death and in case I shall not have made a cash gift to my said wife in approximately the capital amount of the said mortgage in lieu thereof during my lifetime, I give and bequeath to my said wife the sum of fifteen thousand dollars (\$15,000.00) in priority to all other benefits under this my Will and in addition to any other benefits provided for my said wife under this my Will." Save as altered by the codicil or amended he ratified, sanctioned and confirmed the will and all the provisions, trusts, devises and bequests therein set out. The mortgage was paid off during the lifetime of the testator and he did, in lieu thereof during his lifetime, make a cash gift to his wife in approximately the capital amount of the mortgage. Therefore no question concerning the mortgage is before the Court on this application.

The questions that are asked by the originating notice of motion have to do principally with the direction for payment of succession duties. The first of them is whether the widow is "entitled to receive any or all of the devises, bequests or legacies given to her by the said will without deduction for Succession Duty".

I think that the cases uniformly support the statement that the answer to such a question as this depends upon whether on a reading of the whole will there can be found an intention that the legatee or devisee shall be freed of the obligation to pay succession duties: see Gillanders J.A. in *Re Patterson*, [1943] O.W.N. 736, more fully reported in [1944] 1 D.L.R. 196. And I think that such apparent differences as can be found between decided cases result from differences in the language of the wills themselves and from the difficulty in saying, upon the construction of the particular words used, whether the testator has meant to impose upon the executors a duty additional to the duty that the relevant statute imposes upon them. In this particular case I think it is clear that the testator not only desired that his widow should take any devise or legacy given to her free of succession duty, but also that he indicated clearly enough the portion of his estate out of which the executors should pay whatever fell to be paid to the Treasury as duty in respect of any gift, devise or legacy to her contained in the will, and that this case, therefore, is not the same as *Re Patterson*, although it bears some general resemblance to that case. The first thing that the testator did was to direct the duties to be paid out of his estate. Then he proceeded to make gifts to his widow, and then he gave all his estate, real and personal, to his executors upon trust (except as to the shares in the publishing company) to convert and out of the proceeds of the conversion to pay certain pecuniary legacies. I think that in this he indicated what he meant by the "estate" out of which the duties were to be paid: I think he meant the "estate, real and personal, of every nature and kind" which he was giving to the executors upon trust; that is to say, I think he was supplying his own lexicon—that he was treating the property given to the wife as something other than his "estate" out of which the duties were to be paid. The mere fact that he did not know, or forgot, that under the statute the executors would take title to the property given to the wife is unimportant. What is to be sought is his intention, and his intention that the wife should take in specie some things that he did not call a part of his "estate" and that out of the "estate" in terms given to the executors the duties in respect of the things given to his wife should be paid, seems to me to be quite clear. So much as to the duties in respect of the shares of mining stocks, the summer residence and its furnishings, the boat and the motor car.

Then as to the \$21,500. This legacy is to be paid out of the proceeds of the conversion of the "estate" given to the executors; it is a gift contained in the will; it is to be paid in full before the other legacies payable out of the "estate" are to be paid; and I think that the fact that it is so to be paid in full makes it even clearer than otherwise it would have been that the general intention was that the widow should be relieved of any obligation to pay the duties in respect of it. My answer to question no. 1 is "yes".

The second question is: "Are the other specific legatees named in the said will entitled to be paid their respective legacies without deduction for Succession Duty?" I suppose that the expression "specific legatees" used in this question means the pecuniary legatees mentioned in the second of the trusts and the three sons among whom, by clause 3 of the will, the executors are to distribute the shares of the stock of the publishing company. As to the pecuniary legatees, I think the answer is "yes". The only difference between the case of these pecuniary legacies and the widow's legacy of \$21,500 is that the \$21,500 is to be paid in full before any of the other pecuniary legacies are paid. As I have said, I think the fact that the \$21,500 is so to be paid in full helps to render the case very clear as regards the widow, but I do not think that the case is much less clear as regards the other pecuniary legatees. The duties in respect of the legacies to these particular legatees are duties in respect of legacies contained in the will. They are, as I think, directed to be paid out of the estate given to the executors for conversion, and the fact that it is out of that same estate given for conversion that the legacies themselves are to be paid is, I think, immaterial.

As regards the shares of the stock of the publishing company given to the executors for distribution without conversion, my opinion for similar reasons is that the testator's intention was, and was sufficiently indicated, that the duty, if any, in respect of them should likewise be paid out of so much of the estate as was to be converted. The gift of these shares was a gift contained in the will; the direction to the executors to pay the duty, if any, in respect of it was explicit; as in the case of the other gifts, the part of the estate out of which the duty should be paid was, as I think, designated, and I am unable to distinguish between the pecuniary legacies and the legacies of the shares. My answer to question no. 2 then is in the affirmative.

The third question is: "Should the Succession Duties levied with respect to any or all of the gifts *inter vivos* made by the said deceased be paid out of the residuary estate or should the same be charged against the respective donees of any of them?" I can find no reason for saying that these succession duties ought to be paid by the estate. The gifts *inter vivos* were not gifts, devises or legacies in the will contained, and it is only succession duties that may be assessable or chargeable against any gift, devise or legacy in the will contained that is directed to be paid. It is true that in the case of the mortgage originally given to the widow the testator in the codicil provided that if the mortgage should be paid off in his lifetime, and he had not made a cash gift to his wife in his lifetime of approximately the capital amount of the mortgage "in lieu thereof", she should have a legacy in the sum of \$15,000 in priority to all benefits under the will and in addition to any other benefits provided for her under the will, and that the mortgage was paid off and that he did, as all admit, make a gift to the wife during his lifetime in approximately the capital amount of the mortgage; but I do not think that it can fairly be said that the money given to the wife, although it was given in lieu of the mortgage, and although it was a gift mentioned in the will as one that the testator might perhaps make, was a gift or legacy "contained" in the will; and I can find no reason for distinguishing between the gift made *inter vivos* to Mrs. Henderson and the other gifts *inter vivos* referred to in the affidavit filed.

One of the gifts made by the testator in his lifetime was a gift of \$9,075 to his son Roy; others were gifts of much smaller sums to his sons Rexford and Fred. By the will he gave to each of his sons Rexford and Fred \$9,000, and the ultimate residue of his estate he, as has been mentioned, gave to the three sons share and share alike. It is quite possible, therefore, that he would have desired, had he thought about the matter, that the son Roy as regards succession duty in respect of the \$9,075 should be on the same plane as the sons Rexford and Fred are on as regards the duties in respect of the legacies of \$9,000; but this is mere speculation and is of no help, I think, in interpreting the words of the will.

The fourth question is: "If the residuary estate is insufficient to pay the estate liabilities and administration expenses and such Succession Duties as may be properly payable thereout, which of

the specific gifts mentioned in the said will should abate and to what extent?"

At the time of the argument no one was able to say definitely that any abatement would be necessary, and, on what was said about the total value of the assets and the amounts of the debts and succession duties, it was a little difficult to understand why there should have to be any abatement. The question then as to the "extent" of any abatement that may turn out to be necessary is one that cannot well be answered. But counsel for the widow and for the sons Fred Cecil Henderson and Rexford Eugene Henderson were agreed, and no one else suggested that there was any doubt, that the order of abatement would be, first the pecuniary legacies other than the widow's \$21,500, then the \$21,500, then the shares of the stock of the publishing company, and lastly the gifts first made to the widow. That, for practical purposes, seems to be a sufficiently accurate statement, and it may be adopted, although theoretically the summer residence may not stand on quite the same footing as, say, the shares of mining stocks.

The costs of all parties to the application ought to be paid out of the estate, those of the executors being taxed as between solicitor and client.

Order accordingly.

Solicitors for the executors (applicants): Clement, Hattin & Eastman, Kitchener.

[COURT OF APPEAL.]

Fred W. Matthews Company Limited et al. v. Matthews et al.

Trade and Trade Names—Restraining Defendant's Use of his Own Name—Intention to Deceive or Pass Off—Right to Exclusive User—The Unfair Competition Act, 1932 (Dom.), c. 38.

The Court will not restrain a defendant from using his own name in a business simply on the ground that the plaintiff has for many years carried on a similar business under that name and that there is a possibility of confusion or loss of business (there being no evidence of actual confusion or loss). The plaintiff, to succeed in such an action, must show either (1) that, by long use or otherwise, the name has become so identified, in the mind of the public, with his business that he has an exclusive right to use it, or (2) that the defendant is using it in such a way as to represent that his business is that of the plaintiff, or to pass off his goods as those of the plaintiff. *Burgess v. Burgess* (1853), 3 DeG. M. & G. 896; *Jamieson and Co. v. Jamieson* (1898), 15 R.P.C. 169 at 181, applied; *Reddaway et al. v. Banham et al.*, [1896] A.C. 199, referred to.

The Unfair Competition Act, 1932, applies only to "trade names" as therein defined, and has no application where the matter in controversy is the name of a person, used in the advertising of a business, but not as the name under which the business is actually carried on.

AN APPEAL by the defendants from the judgment of McFarland J., [1944] O.W.N. 554, [1945] 1 D.L.R. 57, 4 C.P.R. 1, 4 Fox Pat. C. 88. The facts are fully stated in the reasons for judgment.

18th January 1945. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and McRUER JJ.A.

E. L. Sparling, for the defendants, appellants: The Unfair Competition Act, 1932 (Dom.), c. 38, is not applicable to this case. The trade name of the appellants, "Matthews Burial Service", is not questioned, but only the use by one of the proprietors of the business of his own name for purposes of identification. The name "Fred W. Matthews", as used by the defendants, is no part of their trade name. If the plaintiffs have any remedy, it is only at common law.

Unless the plaintiffs can establish that the words "Fred W. Matthews" have become identified with their business, they are not entitled to a monopoly: *The Hurlbut Company v. The Hurlburt Shoe Company*, [1925] S.C.R. 141 at 146, [1925] 2 D.L.R. 121. They have not established such identification.

Apart from this exclusive right of user, the plaintiffs cannot succeed unless they establish actual fraud or passing off by the defendants, and this was not proved. Evidence of confusion in two isolated cases between the business of the plaintiffs and that of the defendants is not sufficient to support a finding of fraud or lack of good faith: *Turton v. Turton* (1889), 42 Ch. D. 128 at

135, discussed in Kerly on Trade Marks and Trade Names, 5th ed. 1923, p. 647; Kerly, *op. cit.*, p. 633; 32 Halsbury, 2nd ed., p. 623.

F. J. Hughes, K.C., (*R. A. Whitely* with him) for the plaintiffs, respondents: We have no objection to the use of the name "Matthews". What we object to is the name "Fred W.", the defendant's name being Frederick Winspear. [HENDERSON J.A.: The gist of an action of this kind is that the public is deceived, or is likely to be confused.] There was a deliberate imitation of the plaintiff's name. We rely both on The Unfair Competition Act and on our common law rights. We refer to *J. V. Boudrias Fils Limitée v. Boudrias Frères Limitée*, [1934] Ex. C.R. 88, [1934] 4 D.L.R. 328; *Heppell's Ld. v. Eppels Ld. and Eppel* (1928), 46 R.P.C. 96; *The Hurlbut Company v. The Hurlburt Shoe Company*, *supra*; *John Brinsmead & Sons Ld. v. Brinsmead* (1913), 30 R.P.C. 493 at 507; *Hunt's Ltd. v. Hunt*, 56 O.L.R. 349, [1925] 2 D.L.R. 417; *E. Herman and Company Ltd. v. Herman*, [1937] O.W.N. 594; *Bowes v. Shea*, 13 M.P.R. 327, [1939] 2 D.L.R. 76 at 87; *James v. James* (1872), L.R. 13 Eq. 421 at 424.

E. L. Sparling, in reply: The plaintiffs have not shown that they were in any way injured by our conduct. We are trading under a completely different trade name. [HENDERSON J.A.: The complaint here is that you are not using your own name, but have abbreviated it to copy the name of your competitor.] There is no case in which a plaintiff has succeeded in an action of this nature without establishing fraud or a secondary meaning for the name.

Cur. adv. vult.

30th January 1945. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—The appellants, defendants in the action, appeal from the judgment of McFarland J., dated 4th August 1944, whereby the appellants were perpetually restrained from using the words "Fred W. Matthews" in their advertising in the telephone directory, or in any other phase of their business, and were ordered to pay the respondents' costs of action.

The respondents are Fred W. Matthews Company Limited and Fred W. Matthews. The respondent company carries on business in Toronto as funeral director. The business was established by the respondent Fred W. Matthews in the year 1893, and

was continuously carried on by him until 1937, when the respondent company was formed and the business was transferred to it. The appellants carry on business in Toronto as funeral directors under the trade name of Matthews Burial Service. This business was established many years ago by Edgar S. Matthews, now deceased. He was the husband of the appellant Florence E. Matthews and the father of the appellant Frederick Winspear Matthews. Edgar S. Matthews was the brother of the respondent Fred W. Matthews.

It should be said at the outset that it is not complained that the appellants have trespassed upon any rights of the respondents by the use of the trade name "Matthews Burial Service". The late Edgar S. Matthews, and after him the appellants, continuously used that name for so many years in the same manner as it is used now, without complaint from the respondents, that even if complaint were now made, it would hardly be regarded seriously. It is well also to note at the outset that the respondent Fred W. Matthews no longer owns or carries on the business of funeral director, having sold and assigned to his co-respondent, upon its incorporation in January 1937, all interest and goodwill in the business he had, for many years, carried on under the name and style of "Fred W. Matthews Company". What the respondents complain of, and what the judgment in appeal restrains, is the use by the appellants of the name "Fred W. Matthews" in their business, and particularly in their advertising in the telephone directory.

The respondents allege that, by long use and by extensive advertising, the words "Fred W. Matthews" have become distinctive, so as to designate to the public the services and merchandise of the particular kind and quality rendered and provided by them. In my opinion the evidence does not support this claim. There is no evidence that the services and merchandise rendered and provided by the respondents have, at any time, been of any particular kind or quality distinguishing them from the services and merchandise of others carrying on the business of funeral directors. Further, there is no evidence that to the public the name "Fred W. Matthews", as used in connection with the business, had any special significance. To persons who knew the respondent Fred W. Matthews personally, the name signified that the business bearing his name was his business, until he

disposed of it; to others of the public the name meant nothing in particular so far as any evidence discloses.

This not being a case of the wrongful use of a trade name by the appellants, for the respondents do not dispute their right to use the trade name "Matthews Burial Service", and the respondents not having shown that any special meaning has, by use or in any other way, become attached to the name "Fred W. Matthews" as used by the respondents, I can see no ground for applying to this case any of the provisions of The Unfair Competition Act, 1932 (Dom.), c. 38. The respondents, to succeed, must, I think, establish that appellants, in their use of the name "Fred W. Matthews" in their advertisements, are representing their business to be the same business as the business of the respondents: *Burgess v. Burgess* (1853), 3 DeG. M. & G. 896, 43 E.R. 351. In that case Turner L.J. (whose judgment was described by Lord Macnaghten in *Reddaway et al. v. Banham et al.*, [1896] A.C. 199 at 220, as "an accurate and masterly summary of the law"), said:

"No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the Defendant is selling his own goods as the goods of another. Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the Defendant sells goods under his own name, and it happens that the Plaintiff has the same name, it does not follow that the Defendant is selling his goods as the goods of the Plaintiff. It is a question of evidence in each case whether there is false representation or not."

It is necessary, therefore, to see what further the evidence does disclose.

The appellant, Frederick Winspear Matthews, is 30 years of age. As he grew up he began assisting his father, Edgar S. Matthews, in his business, and as his father grew older and his health became impaired, the son took on a larger part of the work. He became a licensed funeral director, and in 1936 his name was inserted in their advertisements in the telephone directory along with the name of his father, the trade name "Matthews Burial Service" always being given the chief place.

After a time the son's name appeared in the body of the advertisements in larger type than the name of the father, but this was not long continued. In the telephone directory issued in April 1942 the son's name did not appear at all. In December 1942 the names of both father and son appeared, both in the same type. Edgar S. Matthews died in April 1943, and in the telephone directory of July 1943 there appeared, not in the classified advertisement section, but in the list of subscribers' names and telephone numbers, that which counsel for the respondent particularly relied upon. The names of both "Matthews Burial Service" and "Fred W. Matthews Co. Ltd." are listed in the usual alphabetical order, and both are in the larger type usual in the case of advertisers. Immediately in place in the column above the name "Fred W. Matthews Co. Ltd." appears in small type "Fred W. Matthews—See Matthews Burial Serv." No telephone number or street address is given, and for these reference must be made to the name "Matthews Burial Service". The respondents say that this insertion of the name "Fred W. Matthews" and the reference to Matthews Burial Service, immediately above the name "Fred W. Matthews Co. Ltd." is calculated to create confusion, and to lead the public to believe that the appellant Frederick Winspear Matthews is Fred W. Matthews, the respondent.

Now, the full entry in the directory of Matthews Burial Service is "Matthews Burial Serv. 221 Carlton—Midway 3300." The entry of the respondent company is "Matthews, Fred W. Co. Ltd. Undertakers 665 Spadina—Kingsdale 2101". Immediately below this entry and set in from the margin appears "Fred W. Matthews r—Midway 3767", and directly below that is the name of another officer of the respondent company, with his residence telephone number, and below that "Service Chapel—Kingsdale 2101". It is, therefore, as plain as it can be that the Fred W. Matthews whose name first appears is connected with Matthews Burial Service at 221 Carlton Street, where the appellants reside over their business premises. It is equally plain, from the entry next below it in large letters, that Fred W. Matthews Company Limited is at 665 Spadina Avenue, and that connected with that business is another Fred W. Matthews whose residence telephone number is Midway 3767.

I confess that I am wholly at a loss to see how it can be said that, by having this entry of his name made in the telephone

directory, the appellant Frederick Winspear Matthews intended to lead people to believe that he was identified with Fred W. Matthews Company Limited. I think he intended the direct opposite. His whole interest was that the public should know that he could be got at Matthews Burial Service. The respondent company is not mentioned in this entry; its entry is the next below it, and just as plainly shows that there is another Fred W. Matthews, with a different telephone number, and that he is connected with the company that bears his name. I suppose if it were right that the respondent Fred W. Matthews had acquired an exclusive property in his name or an exclusive right to use it, as applied to the undertaking business, and had vested that property or right in the respondent company on its incorporation, the only way to protect it might be to enjoin perpetually the use by the appellant Frederick Winspear Matthews, in his business, of the name by which he is commonly known, as the learned trial judge has done. But that is on the assumption that any such exclusive property in the name or right exclusively to use it had been acquired, and, as I have already stated, there is no evidence to support that assumption. The name "Fred W. Matthews" had not acquired any distinctive meaning, and the principle to be applied is stated by Lindley M.R. in *Jamieson and Co. v. Jamieson* (1898), 15 R.P.C. 169 at 181, as follows:—"Now, when we are asked to restrain a man who is carrying on business in his own name, we must take very great care what we are about. The principle applicable to the case, I take it, is this:—The Court ought not to restrain a man from carrying on business in his own name simply because there are people who are doing the same and who will be injured by what he is doing. It would be intolerable if the Court were to interfere, and to prevent people from carrying on business in their own names in rivalry to others of the same name. There must be something far more than that, viz., that the person who is carrying on business in his own name is doing it in such a way as to pass off his goods as the goods of somebody else."

Applying that principle to the case in hand, it is impossible to find, upon the evidence, that the appellants, in the entries they have procured to be made in the list of telephone subscribers to which I have made particular reference, and upon which counsel for the respondent specially relied, or in their advertisements

published in the classified business section of the telephone directory, or in any of their other advertising, did, in fact, represent, or had an intent to lead the public, or any section of the public, to believe, that the business they carried on was the business of the respondents, or of either of them.

Not only do appellants' advertisements themselves show plainly that they relate to the business of Matthews Burial Service, and not to the business carried on by the respondents, but the respective locations of their places of business also serve to distinguish them. The appellants are on Carlton Street at Parliament Street, on the eastern side of Toronto; the respondents are on the western side, on Spadina Avenue, near Bloor Street, between two and three miles away. The appellant Frederick Winspear Matthews said in evidence that each business had its own clientele, and this was not challenged.

The only evidence given of confusion having arisen between the two businesses, on the part of persons who desired to do business with respondents, relates to two separate occasions, both in 1939. In each case a personal friend of the respondent Fred W. Matthews, who tried to get in touch with him on the telephone, by mistake got Matthews Burial Service. In each of these cases, however, the person who desired to speak by telephone to the respondent Fred W. Matthews, and who was the only one to give evidence of the mistake, did not himself look up the telephone number, and the mistake was not his. In the case of one of them, the number was given to him by his wife, who, presumably, looked it up. In the other case another person actually put in the call and got some one on the telephone who was not the respondent. There is no evidence to show how the mistake came to be made in either of these two instances. They occurred in 1939, some years before the entry in the directory of names and numbers of "Fred W. Matthews—see Matthews Burial Serv.", which first appeared in 1943. There is no evidence of any case of mistake or confusion by any one in regard to the two businesses, since 1939.

It is significant that the respondents seem to have no other, and no better, evidence showing actual confusion or mistake than the evidence of such inconclusive cases as the two occurring in 1939 that I have mentioned. There is no evidence whatsoever in this case that anyone who had formerly done business with the

respondents had since done business with the appellants. There is not even evidence of a general character, such as a falling off of respondents' business in any respect, or an increase in the appellants' business, that would warrant a finding that business that the respondents might have expected to get has gone to the appellants. Such evidence as there is respecting the volume of the respective businesses would not indicate any trend in that direction. In my opinion there is no evidence that will support the allegations of the respondents that the public are deceived, and that the appellants are carrying on their business in a manner likely to deceive the public into believing that the appellants' business is that of the respondents.

Much was endeavoured to be made by counsel for the respondents of the fact that the appellant Frederick Winspear Matthews, in the telephone directory, does not use that name, which is the name under which he was baptized, but uses the name Fred W. Matthews, the name by which his uncle has been known for many years. But the evidence is that the appellant is likewise commonly known as Fred W. Matthews. That is as much his name as it is the name of the respondent Fred W. Matthews, for whom, no doubt, in kinder days, he was named. There is no evidence here of the appellants endeavouring to take advantage of any family connection with that respondent, nor of copying respondents' style of advertising or methods of business. There is nothing but the use of the name Fred W. Matthews, the name by which the appellant Frederick Winspear Matthews is known, and which he has a right to use, unless the respondents have shown that they have acquired the exclusive right to its use. This, in my opinion, they have wholly failed to do.

I would allow the appeal, with costs, and dismiss the action, with costs.

Appeal allowed with costs and action dismissed with costs.

Solicitors for the plaintiffs, respondents: Arnoldi, Parry & Campbell, Toronto.

Solicitor for the defendants, appellants: Gerard Beaudoin, Toronto.

[COURT OF APPEAL.]

The King v. The Globe Indemnity Company of Canada.
Maxwell et al. v. The King.

Succession Duties—What Assets Dutiable—Shares in Ontario and Dominion Companies—Certificates Situate outside Ontario—Transfer Agents both within and without Ontario—The Succession Duty Acts, R.S.O. 1937, c. 26, s. 9(a); 1939 (2nd sess.) (Ont.), c. 1, s. 5(a)—The Companies Acts, R.S.O. 1937, c. 251, s. 62; 1934 (Dom.), c. 33.

THE KING V. THE GLOBE INDEMNITY COMPANY OF CANADA.

A citizen of the United States of America, domiciled and resident in the State of Michigan, died there, and probate of his will was granted by a court in that State. He was the owner of 500 shares of stock in a company incorporated under the Ontario Companies Act, the certificates for these shares being in Michigan at his death. This company had its head office in Toronto, and a registrar and transfer agent in that city, and it had also appointed a registrar and transfer agent in Buffalo, in the State of New York, where, it was admitted, the shares of the company could be completely transferred, and where the shares here in question were in fact transferred by the executor.

Held, these shares were not, at the death of the testator, "property situate in Ontario" within the meaning of s. 9(a) of The Succession Duty Act, 1937, and were not subject to the payment of duties under that Act. Under the principle laid down in *Brassard v. Smith et al.*, [1925] A.C. 371, either Ontario or New York might be deemed to be the situs of the shares (in the sense that they could be effectively dealt with there), were it not for the existence of the other transfer office. Since it was clearly established that the shares could have only one situs, the Court, in deciding as between the two places, was entitled to consider other circumstances, and to give effect to such matters as were important to the practical and convenient administration of the estate. *Toronto General Trusts Corporation v. The King*, [1919] A.C. 679; *The King v. Lovitt et al.*, [1912] A.C. 212, applied. There were clear advantages, from the point of view of the Michigan executor, in selecting New York as the place of transfer. He had not applied for probate in Ontario, or sought to avail himself of the provisions of s. 62 of The Companies Act, and there was no way in which the Province could place its hand upon the shares to tax them.

Judgment of Kelly J., [1944] O.R. 358, affirmed.

MAXWELL ET AL. V. THE KING.

Although the provisions of the Dominion Companies Act as to the transfer of shares are not identical in all respects with those of the Ontario Companies Act, yet where it is admitted that a Dominion company, with its head office in Ontario, has power to appoint, and has appointed, a registrar and transfer agent in the State of New York, at whose office shares in the company are fully transferable, the same principle is applicable, and shares in such a company, in circumstances similar to those in the *Globe Indemnity* case, are not "situate in Ontario" within the meaning of s. 5(a) of The Succession Duty Act, 1939.

Judgment of Kelly J., [1944] O.W.N. 351, affirmed.

TWO APPEALS from judgments of Kelly J., [1944] O.R. 358, [1944] 3 D.L.R. 84; [1944] O.W.N. 351, [1944] 3 D.L.R. 88. The appeals were argued together, but separate reasons for judgment were delivered. The facts are fully stated in the reasons for judgment.

16th June 1944. The appeals were heard by ROBERTSON C.J.O. and HENDERSON and GILLANDERS JJ.A.

C. R. Magone, K.C., for the appellant in each case: Where there is a Canadian company with its head office in Ontario and a transfer office in the Province of Ontario, and the share certificates are situated in a State in which they cannot be effectively dealt with, then the preference should be given to Ontario. [ROBERTSON C.J.O.: Why do you say the shares were not in a jurisdiction where they could be transferred? Domicile is one thing, but the situs of shares is quite another.] The mere presence of a transfer office in the State of New York does not give situs to a share of stock. [ROBERTSON C.J.O.: In the case of *The King v. Williams et al.*, [1942] A.C. 541, [1942] 2 All E.R. 95, [1942] 3 D.L.R. 1, [1942] 2 W.W.R. 321, the situs of shares must inevitably have been in Ontario or New York. The three factors to be contemplated were added together and they were in favour of New York.] [HENDERSON J.A.: You say that in the circumstances of this case, you have to return to the old formula that situs is where the shares can be most effectively dealt with.] In one of these cases the shares can be dealt with in four jurisdictions and in the other in two. We say there must be an adequate reason shown why one should be chosen instead of the other. The fact that our consent is required does not fix the situs of shares. [HENDERSON J.A.: Is it your case that there can only be one situs?] [GILLANDERS J.A.: You say that it is the duty of this Court to determine where the situs is.] The Province of Ontario is the choice on a rational basis. [ROBERTSON C.J.O.: It seems peculiar that the situs of shares of these parties can be affected by the opening or closing of a transfer office.] To determine situs a choice must be made between the different places where the shares can be effectively dealt with: *The King v. Williams, supra*, at p. 559. [HENDERSON J.A.: You say, since a choice must be made, the fact that the head office is here tips the scales in favour of Ontario?] Yes, because the domicile of the deceased has nothing to do with the situs of property: *The King v. Williams, supra*. The mere fact that there is a transfer agent in New York, nothing else being in that State, cannot give the shares a situs there: *Re Macfarlane*, [1933] O.R. 44, [1933] 1 D.L.R. 345.

The physical situation of the certificates is not sufficient, by itself, to determine the situs.

J. D. O'Brien, K.C., for the appellant: Since *The Attorney General v. Higgins et al.* (1857), 2 H. & N. 339, 157 E.R. 140, the governing factor in a case of this sort is the answer to the question "Where could the shares have been effectively dealt with, and on what register was there evidence of a change of title?" We must not depart from those principles. In *Treasurer of Ontario v. Blondé et al.*, [1941] O.R. 227, [1941] 3 D.L.R. 225, there is no departure from that proposition in the ordinary terms of situs. Where there are pluralities of jurisdictions, it is essential to find some distinguishing marks on rational grounds which would justify the choice of one jurisdiction against the claim of another. With reference to the two cases at bar, if the shareholders had made application to have their titles evidenced, any proceedings to have the register rectified would lie in the Province of Ontario, so that the distinguishing marks point to the Province of Ontario as the proper jurisdiction.

Everett Bristol, K.C., for The Globe Indemnity Company of Canada, respondent: The appellants are basing their case upon the assertion that this Court must find that these shares had a situs either in Ontario or in the State of New York. Their whole argument collapses if this is not valid. *The King v. Williams*, *supra*, did not lay down a general rule. The problem for this Court is to determine the question whether these shares had a local situation in Ontario. Should the Court hold that they did not have a situs in Ontario, it will be unnecessary to decide where their situs was in fact. In the *Globe Indemnity* case it might be in Ontario or in the United States. [ROBERTSON C.J.O.: In Ontario you have really the hall-mark of the shares. You have a place of transfer in New York and one in Ontario. Your opponents have argued that Ontario is to be preferred.] In dealing with an intangible, one must do so where it may be effectively transferred. The owner of the shares had resided in the United States, and the certificates were there. The executors did not have to come to Ontario, since they had become the lawful holders of the certificates with the right to deal with the shares and have them fully and effectually transferred in the United States of America. New shares could be issued to and registered in the name of a purchaser or transferee without any act being done in Ontario. The executors, deriving their right from the will and probate, and having reduced the cer-

tificates into possession, enjoyed the same power to endorse the certificates as the testator had so as to put them into an equally marketable state: *The King v. National Trust Company*, [1933] S.C.R. 670 at 685-7, [1933] 4 D.L.R. 465. The certificates when reduced into legal possession and endorsed by the Michigan executor were marketable securities within the jurisdiction where they were found, saleable for money, and transferable (in New York State) without it being necessary to do anything in Ontario to make the transfer valid: *The Provincial Treasurer of Manitoba v. Bennett et al.*, [1937] S.C.R. 138 at 142-9, [1937] 2 D.L.R. 1. It is not sufficient that there is a transfer office as well as the head office in Ontario if the certificates are not there and the deceased was not domiciled there: *Re Macfarlane*, [1933] O.R. 44, [1933] 1 D.L.R. 345. To summarize, the certificates were found out of Ontario, the deceased was domiciled out of Ontario, the personal representative took possession of the certificates and had them adequately transferred, and did not need to come to Toronto to complete the transfer. He could not have been compelled to come to Ontario. From a business point of view the shares were not property locally situate in Ontario. If it is necessary to ascribe a situs to the shares in question, then for the purpose of Ontario Succession Duty, that situs can be stated as the United States of America.

P. E. F. Smily, K.C., for the respondents Maxwell et al.: The question here is simply whether these shares are property situate in Ontario. None of the cases has ever suggested that property has not to be in certain places to be enjoyed and used. There must be some place where these shares can be transferred. It does not have to be tied down to a city, county or Province. The onus is upon the appellant to show that the property is in Ontario. If the contest is between Ontario and some other Province, then it must be shown in what other Province the property is situate. [HENDERSON J.A.: Why? The question to be determined is still the same, whether the property is in Ontario or not. The whole basis of the appellant's case is that these shares are property situate in Ontario, and are taxable as such.] It is our contention that we do not have to show the particular place—we base our claim on rational business grounds. Unless it is shown that the shares are prop-

erty situate in Ontario, the taxes should not be payable and our money should be returned to us.

C. R. Magone, K.C., in reply: In *The King v. Williams, supra*, it was said that situs had nothing to do with domicile. The fact that the nationality of the two companies involved is Canadian is another reason for giving the preference to the Province of Ontario.

Cur. adv. vult.

THE KING v. THE GLOBE INDEMNITY COMPANY OF CANADA.

6th February 1945. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal brought on behalf of His Majesty the King, represented by the Treasurer of Ontario, as the plaintiff in the action, against the judgment of Kelly J., dated 12th May 1944, dismissing the action.

The action was brought upon a bond, dated 14th May 1941, entered into by the respondent, whereby it bound itself unto His Majesty the King in the sum of \$7,000 to be paid to the Treasurer of Ontario, the condition of the bond being that if there were paid to the Treasurer of Ontario within three calendar months after the decision by the Judicial Committee of His Majesty's Privy Council, or other final disposition of the then pending appeal in the case of *The King v. Williams et al.*, [1942] A.C. 541, [1942] 2 All E.R. 95, [1942] 3 D.L.R. 1, [1942] 2 W.W.R. 321, from the decision of this Court, all duties payable under the provisions of The Succession Duty Act, 1939, or under the provisions of any Act in force at the date of the death of Thomas Kerr, late of the city of Detroit, in the State of Michigan, who died on or about the 8th day of January 1939, by reason of the death of the said Thomas Kerr, upon or in respect of 500 shares of Lake Shore Mines Limited, together with any interest thereon, then the obligation should be void and of no effect, otherwise to remain in full force and effect.

The decision of the Judicial Committee in the *Williams* case was delivered on the 23rd day of April 1942, and nothing having been paid by way of succession duties to the Treasurer of Ontario in respect of the 500 shares of Lake Shore Mines Limited held by the late Thomas Kerr, this action was commenced on the 22nd day of September 1943. The appellant asked for a

declaration that the 500 shares of stock of Lake Shore Mines Limited were, at the date of death of the said Thomas Kerr, property situate in the Province of Ontario, and exigible for duty under The Succession Duty Act, R.S.O. 1937, c. 26. The appellant further claimed judgment for the sum of \$4,340.03, with interest from the date of death of the said Thomas Kerr, and costs of the action.

The material facts were agreed upon and are set forth in a signed statement put in at the trial. Thomas Kerr, a citizen of the United States of America, resident and domiciled in the city of Detroit, in the State of Michigan, died there on or about 8th January 1939. Probate of his will was granted by the Surrogate Court of Wayne County, Michigan, to his executor, Robert M. Kerr, on 28th February 1939. Thomas Kerr, at the time of his death, was the registered holder of 500 shares of the capital stock of Lake Shore Mines Limited, a company incorporated by letters patent issued under the Ontario Companies Act. Certificates in the name of Thomas Kerr for the 500 shares were located in the city of Detroit at the time of his death. The certificates were not endorsed by Thomas Kerr for transfer in blank, or otherwise. The mining company, acting within its powers, had duly provided for the transfer of its shares at the offices of transfer agents in the city of Toronto, in the Province of Ontario, and at the city of Buffalo, in the State of New York, and, at the time of the death of Thomas Kerr, the 500 shares stood in his name on the share register at each of the transfer offices, and could have been fully and effectively transferred at the office of either of these two transfer agents. The shares could not be transferred, either at the time of the death of Thomas Kerr or subsequently, in the State of Michigan, the State of Thomas Kerr's domicile, and where the share certificates were at the time of his death.

Thomas Kerr's executor duly applied, in April 1939, at the office of the transfer agent in Buffalo, New York, to have the 500 shares transferred into his name as executor, but he was required by the transfer agent to obtain the consent of the Treasurer of Ontario under The Succession Duty Act of that Province, before the transfer would be made. Upon application for that consent, to the Provincial Treasurer, consent was refused unless succession duty, as assessed, was paid or secured.

Subsequently, the executor furnished the bond sued upon herein, and the Treasurer gave his consent and the shares were transferred into the executor's name at the office of the transfer agent at Buffalo, New York.

The appellant's claim to succession duty on the shares of the deceased Thomas Kerr is based upon s. 9 of The Succession Duty Act as it appeared in R.S.O. 1937, c. 26. It is claimed that these shares fall within the description of dutiable property contained in clause (a) of s. 9, as follows: "all property situate in Ontario passing on the death of such person, whether such person was at the time of his death domiciled in Ontario or elsewhere". The whole question is whether the 500 shares of Lake Shore Mines Limited were, for the purposes of The Succession Duty Act, at the death of Thomas Kerr, "property situate in Ontario", as the appellant contends they were.

In entering upon the consideration of such a question as arises here, it is always important to have in mind certain somewhat general propositions that are well settled by statute or by decisions of high authority that are binding on this Court. The first is that by s. 92(2) of The British North America Act, the power of the Province in respect of taxation is defined, and is limited to "Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes." The second is that to determine the local situation of intangible property, when it is necessary to ascribe to it a location, regard is to be had to the rules or principles of the common law. A third proposition is that a Provincial Legislature cannot enlarge the scope of its taxing power, and fix the situs of property in disregard of the rules of the common law, by itself prescribing the rules or conditions for determining its situs. A fourth proposition is that, for the purposes that are of present concern, the property can have only one local situation. For these propositions I refer to the often-cited judgment of Duff C.J. in *The King v. National Trust Company*, [1933] S.C.R. 670, [1933] 4 D.L.R. 465, approved in the recent case of *The King v. Williams et al.*, [1942] A.C. 541, [1942] 2 All E.R. 95, [1942] 3 D.L.R. 1, [1942] 2 W.W.R. 321.

There is also no longer any question of the power of an Ontario company, such as Lake Shore Mines Limited, to establish a transfer agency in Buffalo, New York: *The King v. Williams*, *supra*, and it is admitted that the shares in question were,

at and before and since the death of Thomas Kerr, transferable at the transfer office in Buffalo, as well as in Ontario.

It has also been authoritatively decided that the test in determining situs for succession duty purposes in the case of shares such as are here to be dealt with, is, "Where can the shares be effectively dealt with?" *Brassard v. Smith et al.*, [1925] A.C. 371, [1925] 1 D.L.R. 528, [1925] 1 W.W.R. 311, 38 Que. K.B. 208. This phrase means, "where the shares can be effectively dealt with as between the shareholder and the company, so that the transferee will become legally entitled to all the rights of a member": *The King v. Williams, supra*, at p. 558.

We have, however, in this case, two places where, at the death of the testator, the shares could be dealt with effectively by transfer on the company's books. Either one of these two places would be, without question, the situs of the shares were it not for the fact that the shares could be dealt with effectively at the other place, and the shares can have only one situs. This would seem to be such a case as is referred to by Duff C.J. in *The King v. National Trust Company, supra*, at p. 675, where he says:—

"The circumstances of a particular case may be such that, to them, none of the rules as formulated and applied in decided cases or books of authority is strictly appropriate; and then one must have recourse to analogy, and to the principles underlying the decisions or the rules as formulated or deducible therefrom."

The difficulty of there being two places that answer the test of being a place where the shares can be effectively dealt with by transfer in the company's share register has presented itself before, but in circumstances that differ somewhat from the present. In the *Williams* case, to which I have already referred, the shares in question were, as in this case, shares of Lake Shore Mines Limited, transferable either at a transfer office in Toronto, Ontario, or at a transfer office in Buffalo, New York. In the *Williams* case, however, the deceased shareholder had his residence and his domicile in the State of New York, and the share certificates were in his possession in that State. It was held in the *Williams* case that the situs of the shares was Buffalo, New York. In dealing with the problem arising from the existence of two registries, one in Ontario and one in New York State,

their Lordships in the Privy Council observed "that the solution must be the same in this case as it would have been if the testator had been domiciled in another province of Canada, say in Quebec, instead of in New York, and if all the other facts had been as they were in fact, including the existence of a separate registry in Quebec." Their Lordships did not accept the view put forward that *Brassard v. Smith*, *supra*, and cases following it, had no application, and that a completely different test or tests of situs should be applied. They said that "The principle [of *Brassard v. Smith*] seems . . . not to have lost all weight even if in certain cases a choice has to be made as between more than one place where the shares can effectively be transferred. . . . One or other of the two possible places where the shares can be effectively transferred must therefore be selected on a rational ground."

The actual decision in the *Williams* case, however, seems to have turned upon an admission of counsel that the testator had signed endorsements of transfer on all the share certificates, leaving in blank the names of the transferees and of the attorneys by whom the entries of transfer would be made in the register, and that this had the result of making a delivery of the certificate, with these endorsements signed in blank, a good assignment of the shares. Their Lordships of the Privy Council did not think it would be right for them to express any opinion as to the conclusion which they would have come to if the certificates had not been endorsed and signed in blank by the testator, for that point did not arise for decision, and there were obvious distinctions arising in cases where the endorsement on the certificates had not been signed by the registered holder. The present case is one where there is no signed endorsement upon the share certificates. The *dicta* in the *Williams* case are, however, of value in the present case in that they clearly state the propriety of "keeping within the 'coherent system of principles' by which the courts ought to be guided in such a case."

A more recent case presenting the problem of two places for transfer is *Treasurer of Ontario v. Blondé et al.*, [1941] O.R. 227, [1941] 3 D.L.R. 225, in which the decision of this Court, given before the decision of the *Williams* case in the Privy Council, is still standing on appeal before the Privy Council. In that case the two companies, shares of which were in question, were incorporated under the laws of the State of Michigan,

and both companies had their head offices in Detroit, Michigan. Each company had a transfer agent with office in Detroit, and another transfer agent with office in New York City. The deceased shareholder was resident and domiciled in Windsor, in the Province of Ontario, and his share certificates were in his possession at Windsor. The share certificates bore no signed endorsement of transfer. The Chief Justice of the High Court, before whom the case was tried, was of opinion that as he was unable to determine the situs of the shares as between the two places where there were transfer offices, he ought to disregard both of them, and he held that the situs was Ontario, where the deceased shareholder had resided, and where he had the share certificates in his possession. This Court allowed an appeal from that decision, and held that it was not in accord with the principle settled by *Brassard v. Smith, supra*, to disregard the places where the shares could be dealt with effectively by transfer, in favour of a place where they could not be so dealt with, and that to exclude Ontario from consideration as a possible situs, it was not necessary to determine, as between the State of Michigan and the State of New York, which was the situs—plainly, it could not be Ontario. That case is also distinguishable on its facts from the present case. In the present case the shares could be completely transferred in Ontario, and if there was not, in the State of New York, another transfer office where the shares could be, and in fact, have been, completely transferred, it would be necessary, in accordance with the principle of *Brassard v. Smith*, to hold that the situs of the shares is Ontario.

There have been other cases arising under the succession duty legislation of this Province, or of some of the other Provinces of Canada, where it has been necessary, in determining the situs of property, to decide between two places, either one of which would fulfil all the requirements of, and would be held to be, the situs, if it were not that the other place also possessed all the qualifications ordinarily deemed essential for the purpose. *Toronto General Trusts Corporation v. The King*, [1919] A.C. 679, 46 D.L.R. 318, [1919] 2 W.W.R. 354, is such a case. The property in question there consisted of certain mortgages, and the rule to be applied in determining situs in such a case, in ordinary circumstances, is the rule in respect of a specialty: its locality is the place where the specialty is found at the time

of the creditor's death. The mortgages in question were made in duplicate, and at the time of the death of the mortgagee one duplicate original of each mortgage was in the Province of Ontario, and the other was in the Province of Alberta. To quote from the judgment, at p. 684, "In these circumstances any argument which goes to show that, under the rule which fixes the locality of a specialty debt in the place where the specialty is found, the debts in this case were situate in Ontario at the testator's death, is equally effective to prove that they were situate in Alberta; and yet it is plainly impossible to hold that they were situate in both provinces at once." In deciding that, for the purpose of succession duty, the mortgages were situate in Alberta, their Lordships of the Privy Council gave weight to the circumstances that the mortgagors were, at the date of execution of the mortgages, resident in Alberta; that the place of payment of the debt was, in each case, in Alberta; that the mortgage debts were secured on lands in Alberta; that the mortgages were executed in a form prescribed by an Alberta statute, and derived their force and effect from the terms of that statute, and that to recover the debt, or to have the benefit of the securities, the administrator must claim the protection and assistance of the Alberta law. The judgment does not make any distinctions in the weight that should be given individually to these several circumstances, and one may be permitted, with due respect, to think they are not all of equal weight. The case is of value, however, for present purposes, as affording some authoritative indication as to the nature of the matters that may be taken into account or as to the direction in which one should look when the ordinary rule for determining situs is not sufficient, notwithstanding that the case deals with specialty debts, to which, generally, a quite different rule applies from that applicable to shares in a company, and that the accompanying circumstances are not the same as in this case.

There is also the case of *The King v. Lovitt et al.*, [1912] A.C. 212, C.R. [1912] A.C. 15, 10 E.L.R. 156, where the property sought to be made liable to succession duty was a sum deposited by the testator in a branch of the Bank of British North America, at St. John, New Brunswick. The head office of the bank was in London, and it was a British corporation. The property being a simple contract debt, its local situation was the residence of the debtor, where the assets to satisfy the debt

would presumably be. The contentions were, on the one hand, that St. John, where the money had been deposited, was the proper place for its recovery, and was, therefore, to be deemed its location, and on the other hand, that London, where the bank had its head office, was to be deemed the location. It was held that "Although branch banks are agencies of one principal firm, it is well settled that for certain special purposes of banking business they may be regarded as distinct trading bodies." A number of cases were referred to, of which it was said, "In each of these cases the Courts, having regard to the necessary course of business between the parties, held that the bank had in some measure localized its obligation to its customer or creditor, so as to confine it, primarily at all events, to a particular branch," and that the present case came well within the principle thus laid down. The debt was, therefore, held to be property situate within the Province of New Brunswick.

It is, I think, a fair observation that, in the two cases of *Toronto General Trusts Corporation v. The King* and *The King v. Lovitt*, to determine the situs of property as between two places, each of which answered to the test commonly applied, weight was given to such circumstances as were important to the practical and convenient administration of the property in question. In the first-mentioned case, although the property was a specialty debt, importance was attached to such circumstances as the place for payment, the residence of the mortgagor, the location of the property upon which the debt was secured, and others, all bearing relation to recovery of the debt and the enforcement of the security. In *The King v. Lovitt*, where the situs of a simple contract debt was in question, a branch office of the bank was preferred to the head office, it having been the place of deposit, and being, therefore, the proper place for payment, although, if payment could not be obtained at the branch office, the bank would be liable to pay at its head office.

In the present case the appellant relies upon the circumstance that the head office of the company whose shares are in question is within Ontario, as giving Ontario the best claim to be considered the situs of the shares. The location of the head office has not been considered, in any of the cases, as an important factor in determining the situs of shares for the purpose of succession duty. As against that the share certificates were in the State of Michigan, and on the death of the shareholder

they came into the possession of his executor there. The record does not give much information in regard to the jurisdiction of the Court that granted probate in Michigan, or in regard to the recognition given in other States to probate granted in Michigan, but the executor to whom probate was granted in Michigan was recognized in New York State as having authority to make a transfer of the shares in that State. The only requirement was that the consent of the Treasurer of the Province of Ontario, under The Succession Duty Act of that Province, be obtained. On that consent being obtained, on the terms already stated, the Michigan executor was able to make a transfer of the shares, on the company's register, in the transfer office at Buffalo, New York. It is true that under the provisions of s. 62 of the Ontario Companies Act (R.S.O. 1937, c. 251), the production and deposit of the probate, or of an authenticated copy thereof, with a statutory declaration showing the nature of the transmission of the shares, would have afforded the directors of the company sufficient justification and authority to consent to the making of a like transfer by the Michigan executor, on the register, in the transfer office at Toronto, but only upon compliance with the provisions of The Succession Duty Act. Putting aside the question that is in dispute here, of the right of the Province of Ontario to demand succession duty, there are clear advantages in favour of Buffalo, New York, as the place of transfer. The consent of the directors is not required, as it would be before a transfer of the shares could be registered under s. 62 of the Ontario Companies Act, and under that section the provisions of the Ontario Succession Duty Act would definitely have to be complied with.

The terms of the resolution of the company's board of directors, appointing a transfer agent at Buffalo, have some significance. They established an office where "shareholders may have their stock registered and transferred within the United States of America", and not merely within the State of New York. It is obviously of advantage—in a business sense—to shareholders in the United States generally, to be able to effect transfers of their shares within the limits of their own country. The matter of exchange is, at times, of considerable importance, and so, likewise, may be the mere transmitting across the international border of the share certificates. In the event of a sale

of shares, within the United States, it is an advantage to be able to complete the sale within the United States and under its laws.

The Province of Ontario, by letters patent, created a company with a capacity to open an office for the transfer of its shares in a foreign country: *The King v. Williams, supra*; *Bonanza Creek Mining Company, Limited v. The King*, [1916] 1 A.C. 566, 26 D.L.R. 273, 10 W.W.R. 391, 34 W.L.R. 177, 25 Que. K.B. 170, and R.S.O. 1937, c. 251, s. 217. Share certificates may be brought into that office and the shares they represent may be transferred on the company's register, kept there for the purpose, and new certificates may thereupon be issued to the transferee, all at that office. On any reasonable interpretation such an office would seem to answer the description of a place where the shares can be transferred effectively. That it is so, is really not disputed. Bearing in mind that the Legislature of the Province cannot, by legislation, for the purposes of taxation, alter the rules of the common law in regard to the situs of property, how can the Province of Ontario in the case of shares in the circumstances here present place its hand upon them to tax them? The shares are not brought within Ontario by any act of the executor. The executor has not taken advantage of s. 62 of the Ontario Companies Act to transfer the shares into his own name. The executor has acted under a will admitted to probate in the State of Michigan, and, by virtue of such recognition as is given it in the State of New York, he has effected a complete transfer of the shares. If he had elected to come within Ontario by applying for letters probate here, or even by taking advantage of s. 62 of the Ontario Companies Act, he might be held to have brought himself within the provisions of The Succession Duty Act of the Province, but not having done so, I am unable to find any valid ground for the appellant's claim. It is not necessary that we should make any decision as to situs as between the States of Michigan and New York, a matter upon which some evidence was adduced by the appellant. Having concluded that the shares are not property within Ontario, the other question is outside the record, and, I presume, beyond our jurisdiction.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

MAXWELL ET AL. V. THE KING.

6th February 1945. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the judgment of Kelly J., dated 12th May 1944, whereby, on the petition of the executors of the last will and testament of Francis T. Maxwell, deceased, as suppliants, it was declared that certain shares of the capital stock of International Nickel Company of Canada Limited, held by the deceased Francis T. Maxwell at the time of his death, were not subject to succession duty in the Province of Ontario, and further declared that the suppliants were entitled to a refund of the sum of \$1,352.27, paid by them to the Province of Ontario, with interest thereon and costs. From this judgment His Majesty the King, as represented by the Attorney-General for Ontario, appeals.

A statement of facts agreed upon by counsel was filed. It was agreed that Francis T. Maxwell died on the 23rd day of March 1942, resident and domiciled in the State of Connecticut, and that probate of his last will was granted to the present respondents by a Court of Probate in that State. Francis T. Maxwell, at the time of his death, was the owner of 200 shares of the common stock of International Nickel Company of Canada Limited, standing in his name on the company's register. The certificates for these shares, issued by the company's transfer agent at New York, were located in the State of Connecticut, at the time of his death, and were not endorsed for transfer, in blank or otherwise. The company, whose head office is at Copper Cliff, in the Province of Ontario, had power and authority to provide, and had duly provided, for transfer of its shares, by transfer agents at Toronto, in the Province of Ontario, Montreal, in the Province of Quebec, London, England, and New York City, and the shares in question were transferable at the offices of any of these transfer agents. Certificates can be issued and delivered to transferees in New York City without any act in respect thereto being performed in Ontario. The company's shares are listed on the stock exchange at each of these four places, and there is an active market in the shares on each of these exchanges. The respondent executors, in the course of their duties, sold the 200 shares that stood in the name of Francis T. Maxwell, and presented the share certificates, with transfer

duly endorsed by them, to the company's transfer agent at New York for transfer, but transfer was refused without the consent being obtained of the Treasurer of Ontario, under the provisions of The Succession Duty Act. Such consent being refused without payment of succession duty, the respondents paid to the Province of Ontario the sum of \$1,352.27 for succession duty and accrued interest, in order to complete the sale made by them. At the trial counsel for the appellant abandoned an objection taken in the statement of defence, that the money was paid voluntarily.

This case was tried with the case of *The King v. The Globe Indemnity Company of Canada*, and, by arrangement between counsel, the appeals to this Court in both cases were heard at the same time. The question in this appeal, as in the *Globe Indemnity* case, is whether, for succession duty purposes, the shares in question were, at the death of the testator "property situate in Ontario". The Succession Duty Act to be referred to in the present case, is the Act of 1939 passed in the second session of that year as c. 1. Section 5 of that Act provides as follows:

"Subject to sections 3 and 4, on the death of any person whether he dies domiciled in Ontario or elsewhere,—

"(a) where any property situate in Ontario passes on his death, duty shall be levied on such property in accordance with the dutiable value thereof".

The provisions of the Dominion Companies Act (that being the Act governing International Nickel Company of Canada Limited) relating to the transfer of shares, are not, in all particulars, identical with the Provincial statute that applied in the *Globe Indemnity* case, but in view of the admissions in this case as to the power of the company to appoint transfer agents, and as to their due appointment, and their duties and authority, any difference in the terms of the statutes relating to the companies is not material here. It may, however, be of moment, in view of some aspects of the case as presented to us, to note that while International Nickel Company of Canada Limited, like the mining company whose shares were involved in the *Globe Indemnity* case, has its head office in Ontario, it is a Dominion company, and the powers it derives directly from its letters patent are not as restricted territorially as in the case of a Provincial company.

In this case, as in the *Globe Indemnity* case, the deceased shareholder, at the time of his death, was domiciled and resident and had his share certificates in one of the United States of America. The company had no transfer agent in that particular State, but had a transfer agent in the State of New York, and the shares in question were transferable at the office of the New York agent. The shares were likewise transferable at transfer offices in Toronto, Ontario, in Montreal, in the Province of Quebec, and in London, England.

For the reasons stated in my judgment in the *Globe Indemnity* case, I am of opinion that the conclusion reached by the trial judge was the proper one, and that this appeal should be dismissed, with costs.

Appeal dismissed with costs.

Solicitor for the appellant in each case: C. R. Magone, Toronto.

Solicitors for the respondent The Globe Indemnity Company of Canada: White, Ruel & Bristol, Toronto.

Solicitors for the respondents Maxwell et al.: Smily, Shaver, DeRoche & Fraser, Toronto.

[COURT OF APPEAL.]

Re Aberdeen Estate.

Succession Duties—What Assets Dutiable—Shares in Dominion and Ontario Companies, Transferable outside Ontario and Owned by Non-resident—Aggregate Value of Foreign Estate with Assets in Ontario—What Deductions Permitted—The Succession Duty Act, 1939 (2nd sess.) (Ont.), c. 1, ss. 1(a), 2(5), 4, 6.

Where a foreign estate owns assets in Ontario, which are subject to duty under The Succession Duty Act, 1939, the rate of duty is determined by, *inter alia*, the "aggregate value" of the estate. The term "aggregate value" is defined in s. 1(a), and that clause expressly states what deductions shall be permitted from the gross value, *viz.*, the allowances authorized by s. 2(5) and the exemptions authorized by s. 4. No other deductions may be made, even if they are authorized by the law of the deceased's domicile.

AN APPEAL by the Treasurer of Ontario from the judgment of Kelly J., [1944] O.W.N. 431, [1944] 3 D.L.R. 90. The facts are fully stated in the reasons for judgment.

16th October 1944. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and GILLANDERS JJ.A.

C. R. Magone, K.C., for the appellant: The nearest case to this, on its facts, is *Treasurer of Ontario v. Blondé et al.*, [1941] O.R. 227, [1941] 3 D.L.R. 225. The fact that the Privy Council, in *The King v. Williams et al.*, [1942] A.C. 541, [1942] 2 All E.R. 95, [1942] 3 D.L.R. 1, [1942] 2 W.W.R. 321, relied upon the fact that the certificates were endorsed shows that it did not agree with the reasons of this Court in that case.

The material sections of The Succession Duty Act, 1939 (2nd sess.) (Ont.), c. 1, are ss. 1(a), 1(g), 2(1)(a), 2(5)(c), 5(a), 6, 31(10). Where shares in a Canadian company are situate in a State in which they cannot be effectively dealt with, preference should be given, in determining situs, to the situation of the company's head office: *Treasurer of Ontario v. Blondé et al.*, *supra*. The situs cannot be held to be in New York merely because the transfer agent is there: *Re Macfarlane*, [1933] O.R. 44, [1933] 1 D.L.R. 345. [GILLANDERS J.A.: Where the question is where the shares can be effectively dealt with, what is the materiality of the situation of the head office? Why should we not rather consider where the shares can most conveniently be dealt with?] That would reduce the question merely to a computation of distances. In *Toronto General Trusts Corporation v. The King*, [1919] A.C. 679, 46 D.L.R. 318, [1919] 2 W.W.R. 354, the Privy Council held that the mortgage was situate in Alberta because the land was there. [ROBERTSON C.J.O.: There was also a question of registration.] This company owes its corporate existence to the laws of Ontario.

[ROBERTSON C.J.O.: Can we make any headway by going back to the principles laid down in *Brassard v. Smith et al.*, [1925] A.C. 371, [1925] 1 D.L.R. 528, [1925] 1 W.W.R. 311, 38 Que. K.B. 208?] That case cannot apply to situations that arise in the case of joint stock companies. If the rules there laid down were to be applied, then this Court was wrong in the *Blondé* case. Before any certificates are issued, an issue of capital is authorized in Ontario. As soon as the certificates are issued, the directors are empowered to appoint transfer agents. When the certificate is situated in the same place in which there is a transfer agent, there is no difficulty, but this principle should not be extended to such a case as the present.

[GILLANDERS J.A.: Why should the question not be decided upon a basis of practical convenience? We have no evidence as to the relative convenience of the two possible transfer offices.]

To attempt to say that the situs is where the certificate will most probably be dealt with is beyond the powers of the Province, which, according to the Privy Council, cannot legislate to fix a fictional situs for shares. What the executor might do is of no weight: *The Attorney General v. Higgins et al.* (1857), 2 H. & N. 339, 157 E.R. 140, relied on in *Brassard v. Smith et al.*

[ROBERTSON C.J.O.: Most of the cases seem to decide as to the country in which the situs is to be fixed. Why can we not say simply that these shares had a situs in the United States of America, without specifying a particular State?] An expert witness was called, and swore that there was no such thing as "domicile at large" in the United States. [ROBERTSON C.J.O.: But this is not a question of domicile.] In the United States, the States have power to legislate as to situs. [ROBERTSON C.J.O.: But the question here is as to the situs under the principles of our law, not that of a foreign state.]

As to the deductions allowable in determining "aggregate value", I rely on the statute. Aggregate and dutiable values must be determined according to the plain words of the statute, and only the debts set out in s. 2(5) are deductible.

John Jennings, K.C., for the respondents: There are only two differences between this case and *The King v. Williams, supra*, and neither of them is sufficient to justify a departure from the established rules. The differences are: (1) that the certificates in this case were not endorsed by the shareholder; and (2) the transfer agent was not situated in the State in which the certificates were found, and the testator was domiciled.

As to (1), no one has been able to suggest any ground upon which endorsement of the share certificates could have any effect upon situs. The discussion of this fact in the judgment in the *Williams* case is based upon a series of misunderstandings.

As to (2), the power of the taxing authority under s. 5(a) of the Act is to tax "property situate in Ontario", and "such property" is made liable to duty. In this case, they seek to apply a sanction which is *ultra vires*—there is no property within Ontario, and they seek to impose the sanction upon a person outside it. The foreign transfer agent is instructed by the company not to transfer shares without the consent of the Treasurer of Ontario, who has threatened that if such instructions are not given, he will collect the tax from the company

itself. This is wholly illegal, particularly as to a Dominion company: *Great-West Saddlery Company, Limited v. The King*, [1921] 2 A.C. 91, 58 D.L.R. 1, [1921] 1 W.W.R. 1034. [HENDERSON J.A.: We are not concerned with that in the present appeal. That question could only arise in proceedings between the Crown and the company.] My point is that even if these shares are found to be "property situate in Ontario", they are still not dutiable, because the duty is imposed, by s. 5(a) on the property itself, and the property cannot be reached, except by this illegal sanction.

The shares are not "property situate in Ontario". A long line of cases fixes the situs at the place where the shares can be effectively dealt with. Here there are two such places, and the determination as between these two must be on a rational basis. I rely on the *Williams* case, *supra*, at pp. 549 *et seq.* [ROBERTSON C.J.O.: The trouble with the judgment in the *Williams* case is that after several *dicta* which seem to be important, it then brushes them aside, and proceeds upon the ground that the certificates, having been endorsed, are transferable on delivery.]

[ROBERTSON C.J.O.: On whom is the onus in this case? Must you show that the Treasurer was wrong?] I submit not. We are in exactly the same position as if we had resisted payment in the first instance.

The fact that the transfer agent was not in the same State in which the testator was domiciled cannot affect the question of situs. The determination of situs for intangible property is not affected by domicile. [ROBERTSON C.J.O.: The head office of the company was in Ontario, and the shares were necessarily transferable there; the right to transfer them in New York depends wholly on the by-laws of the company.] The relationship between a company and its shareholder is contractual: *In re William Metcalfe and Sons, Limited*, [1933] Ch. 142 at 154. One term of the contract was that this testator could effectually transfer his shares within the United States of America. The Provincial Legislature cannot constitutionally interfere with the operations of a company incorporated by the Dominion, and the right of shareholders of a Dominion company freely to transfer their shares is an essential right flowing from Dominion incorporation, and cannot be taken away by Provin-

cial legislation: see The Companies Act, 1934 (Dom.), c. 33, ss. 38, 39(2), 40.

C. R. Magone, K.C., in reply: The real question is as to what is the "business sense" spoken of in *The King v. Williams*, *supra*. The certificates were never here, but we say the shares were situate in Ontario.

Cur. adv. vult.

16th February 1945. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the judgment of Kelly J., dated 27th May 1944, in a proceeding taken under s. 31 of The Succession Duty Act, 1939 (2nd sess.), c. 1, by way of appeal by the executors of the estate of James D. Aberdein, deceased, from the decision of the Treasurer of Ontario, confirming a statement of the amount of succession duty claimed to be payable in respect of the said estate.

The deceased James D. Aberdein died on the 11th December 1940. At the time of his death he resided, and was domiciled, in the Commonwealth of Massachusetts. At his death he was the holder of 4,000 shares of the capital stock of Dome Mines Limited, a company incorporated under The Companies Act of Canada, with head office in the Province of Ontario. These shares were represented by 40 certificates for 100 shares each, and the certificates were, at the time of the death of James D. Aberdein, in a safety deposit box in a bank at Boston, Massachusetts. None of the share certificates had been endorsed for transfer, in blank or otherwise.

The company had appointed a transfer agent in the city of New York, and another in the city of Toronto, Ontario. The shares in question were entered in the name of Aberdein on the company's register, at both of these places, and the shares were transferable at the office of either transfer agent.

James D. Aberdein was also, at the time of his death, the holder of 200 shares of the capital stock of Nipissing Mines Limited, a company incorporated under The Companies Act of Ontario, with its head office in the Province of Ontario. The share certificates were in the names of James D. Aberdein and Mrs. Alice R. Aberdein as "joint tenants with right of survivorship and not as tenants in common". Alice R. Aberdein was

the wife of the deceased, and she survived him. She has been at all times a resident of the United States of America and is domiciled there. None of the share certificates had been endorsed for transfer in blank or otherwise. This company had appointed transfer agents at the city of New York, and at Toronto, Ontario. The shares were on the register of the company, both in New York and in Toronto, in the same names as appeared on the share certificates, and they were transferable at the transfer office at either New York or Toronto. The certificates for these shares and for the shares of Dome Mines Limited were located in Massachusetts at the time of the death.

James D. Aberdeen appears also to have been the holder of 2,000 shares of Kerr Lake Mines Ltd., and the holder of shares of two other mining companies, all of these companies being Ontario companies, but, presumably, none of them had provided a transfer office outside Ontario. No question is before us with respect to these shares, and they were, in any event, of little value. \$260 is the value placed on the shares of Kerr Lake Mines Ltd., and no value at all is assigned to the other mining shares. The only purpose in mentioning them is this, that I presume it was to enable the Massachusetts executors to deal with these shares in Ontario, that they filed the affidavit hereinafter mentioned, the filing of which led directly to the present proceeding.

I do not find it so stated, but it may safely be presumed, that probate of the will of James D. Aberdeen was obtained in Massachusetts. In June 1942, almost one year and a half after the testator's death, an affidavit was made under the Ontario Succession Duty Act, 1939 (2nd sess.), c. 1, by Harold E. Stevens, one of the executors of James D. Aberdeen, setting forth in schedules a summary of his estate, but showing in detail the shares that the testator held at the time of his death in these several mining companies, whose head offices were in Ontario, including those with transfer offices outside Ontario, as well as the others. The schedule setting out these shares is headed with the statement "None situated in Ontario".

Following upon this affidavit, a statement of succession duties demanded was served on behalf of the Treasury Department of the Province of Ontario, upon the Toronto solicitors for the executors, in pursuance of s. 31 of The Succession Duty Act, 1939. The executors, through their Toronto solicitors, there-

upon, pursuant to the same section, served notice of appeal from the assessment of succession duty. This was followed, in due course, by a notice of the Treasurer's decision confirming the statement that had been served. This, in turn, was followed by a notice of dissatisfaction, served under the same section of the statute, by the Toronto solicitors of the executors. The Treasurer of Ontario thereupon served his reply, which again confirmed the original statement.

Section 31 of The Succession Duty Act provides that when the parties appealing against the assessment have taken the steps hereinbefore outlined, and the Treasurer has finally confirmed his assessment of succession duty, the parties appealing may pay such part of the succession duty demanded as is then claimed to have become payable, and give security for any part thereof that has not yet become payable, and, upon further giving security for costs, may file in court true copies of the notices that have been so exchanged, and of the affidavit originally filed, and the documents so filed shall constitute the record, and the proceedings shall thereupon become a cause in the Supreme Court of Ontario, and may be entered for trial, either by the persons appealing against the assessment or by the Treasurer. The executors accordingly paid to the Treasurer the sum of \$13,446.78, being the amount of succession duty demanded, with certain interest thereon, and, having filed copies of the necessary documents, these, thereupon, formed the record upon which this case was tried. *

Other grounds of dissatisfaction with the assessment of succession duty were stated in the notice served upon the Provincial Treasurer on behalf of the executors, than their objection to any assessment whatever in respect of the shares of Dome Mines Limited and Nipissing Mines Limited. We are concerned, however, on this appeal with only one of these further grounds of dissatisfaction. With the affidavit of the executor, Harold E. Stevens, filed with the Provincial Treasurer in June 1942, was a statement of debts and expenses of administration, amounting to a total of \$95,335.11. The executors claimed the right to deduct the whole of this amount from the aggregate value of the estate, for the purpose of the assessment of succession duty. Under s. 6 of The Succession Duty Act, 1939, the amount of succession duty payable upon the property passing to any one beneficiary is computed at a rate *per centum* of its dutiable

value. The rates vary with the aggregate amount of the estate, and also with the value of the individual gifts, and with the relationship, if any, of the beneficiary to the deceased. The Treasurer, in his notice of assessment of succession duty, disallowed the greater part of the amount claimed by the executors as a deduction from the aggregate value of the estate under the heading of "Debts and Expenses of Administration". While the amount by which the deductions were decreased, and the aggregate value of the estate correspondingly increased, in the Treasurer's statement, is substantial, in the final result it does not matter a great deal in the amount of duty payable if the shares of Dome Mines Limited and Nipissing Mines Limited are not assessable for succession duty in Ontario. If these are not assessable, the only other property in Ontario remaining to be assessed for succession duty is the shares in Kerr Lake Mines Ltd., valued at \$260, and the amount of succession duty applicable to that item, on the basis of the Treasurer's assessment, is very small. If, however, the shares of Dome Mines Limited and Nipissing Mines Limited are assessable for succession duty, the amount allowable for deductions is of some consequence.

This action was tried with the cases of *The King v. The Globe Indemnity Company of Canada* and *Maxwell et al. v. The King*, ante, p. 190. The appeal to this Court was, however, argued separately. The principal question is, as in the two cases mentioned, whether, for succession duty purposes, the shares of Dome Mines Limited and of Nipissing Mines Limited were, at the time of the testator's death, "property situate in Ontario". The Succession Duty Act to which reference must be made in this case, is the Act passed in the second session of the year 1939.

As in each of the other two cases mentioned, the deceased shareholder, at the time of his death, was resident in one of the United States of America in which no transfer agent had been appointed by either of the companies whose shares are in question, but there was, in the case of each company, a transfer office at the city of New York, and also a transfer office at Toronto, in the Province of Ontario. The shares of each company could be completely transferred at either New York or Toronto.

For the reasons stated in my judgment in the *Globe Indemnity* case, I am of opinion that the learned trial judge was right in his conclusion that the shares held by the deceased James D.

Aberdein in Dome Mines Limited and in Nipissing Mines Limited were not, at the time of his death, property situate in Ontario, and that they were not, therefore, liable to be assessed for succession duty in Ontario.

With respect to the shares of Nipissing Mines Limited which were held jointly by the deceased and his wife, with right of survivorship, in view of the finding that the shares were not within Ontario it is not important, for the present purpose, to consider the provision of The Succession Duty Act in force in Ontario in relation to property held jointly.

Upon the question of deductions proper to be allowed for the purpose of arriving at the aggregate value of the estate, to be used in determining the rate *per centum* at which succession duties shall be computed upon the property within Ontario, in my opinion this matter is governed by The Succession Duty Act of Ontario under which the succession duty is levied. "Aggregate value" is defined by clause (a) of s. 1, and what is permitted to be deducted is stated in this way, "less the debts, incumbrances and other allowances authorized by subsection 5 of section 2 and less the exemptions authorized by section 4". The deductions to be made in ascertaining the amount of succession duty payable under The Succession Duty Act of Ontario upon property within Ontario, are the deductions authorized by the Ontario statute. They are only one factor in determining the rate of duty. In this particular the appeal should be allowed, and in all other respects it should be dismissed. The respondent is entitled to the costs of the appeal.

*Appeal dismissed with costs, subject
to a variation.*

Solicitor for the Treasurer of Ontario, appellant: C. R. Magone, Toronto.

Solicitors for the executors, respondents: Jennings & Clute, Toronto.

[HOGG J.]

Liptay et al. v. Parkway Securities Limited.

Mortgages—Relief against Forfeiture—Acceleration Clause—Default in Payment of Principal and Interest—Notice of Exercising Power of Sale—Tender—Insurance Effected by Mortgagee—The Short Forms of Mortgages Act, R.S.O. 1937, c. 160, s. 2(1), and clause 16 of schedule B—Rule 485.

The words "arrears under these presents" in the extended form of clause 16 in schedule B of The Short Forms of Mortgages Act include arrears of interest and arrears of principal which, by the terms of the mortgage itself, and not because of the acceleration clause, have become due and payable by lapse of time, and are therefore in default. Money payable only under the acceleration clause is not money payable by lapse of time. The effect of the clause therefore is that a mortgagor is entitled in all cases, provided judgment has not been given against him, to pay all arrears under the mortgage, whether of interest or of principal, together with lawful charges and costs, and thus to prevent the mortgagee from taking any further proceedings based upon that default. *Todd v. Linklater* (1901), 1 O.L.R. 103; *Schwartz v. Williams* (1915), 35 O.L.R. 33, applied. Where, therefore, a proper tender is made after service of a notice of intention to exercise the power of sale, the mortgagor will be entitled to have the sale proceedings stayed under Rule 485.

Where mortgaged property has been insured before the mortgage is given, and the insurance is transferred to the mortgagee, the latter is not entitled, merely because he prefers to have the insurance placed with an insurer of his own choice, to cancel the policy without notice to the mortgagor, and without refunding to him the unearned portion of the premium. *Morrow v. The Lancashire Insurance Company* (1899), 26 O.A.R. 173, followed.

A notice of exercising a power of sale in a mortgage need not necessarily be signed by the mortgagee himself, but may be valid and sufficient if signed only by a solicitor on his behalf. *Fenwick v. Whitwam et al.* (1901), 1 O.L.R. 24, followed; *Ansell v. Bradley* (1916), 37 O.L.R. 142, distinguished.

AN ACTION by mortgagors for relief. The facts are fully stated in the reasons for judgment.

22nd and 23rd January 1945. The action was tried by HOGG J. without a jury at Toronto.

R. S. Mills, for the plaintiffs.

F. J. Sparham, for the defendant.

2nd February 1945. HOGG J.:—The plaintiffs owned a property known as 77-79 Pembroke Street in the city of Toronto, upon which, on the 1st February 1944, they gave a mortgage for \$15,000 to one Alexander B. Beverly.

The principal sum under the mortgage is payable in instalments of \$100 each with interest at 5 per cent., in each month from March to December 1944, on the 1st days of each month in the years 1945, 1946, 1947 and 1948, and on the 1st days of January and February 1949. The balance of the said principal

sum becomes due and payable on the 1st March 1949, with interest as aforesaid.

The mortgage contains, *inter alia*, the covenants and provisos set out in The Short Forms of Mortgages Act, R.S.O. 1937, c. 160.

The instalments of principal and interest were paid up to and including 1st September 1944. About this time the heating apparatus upon the premises was found to be defective and new heating equipment was installed at a cost to the plaintiffs of some \$500. For this reason the plaintiffs failed to pay the instalments of principal and interest which became due on the 1st days of October and November 1944.

I have concluded that the evidence shows the plaintiffs requested a statement of the mortgage account on or about the 7th November 1944, from the defendant's agent, the Provincial Bank of Canada. The manager in Toronto of that bank stated that he had not received such request. At any rate no such statement was received by the plaintiffs and on the 10th November 1944, they were served with a notice, on behalf of the defendant company, of exercising the power of sale contained in the mortgage. The mortgage had been assigned on the 30th March 1944 by the aforesaid Beverly to the defendant company. The defendant company admits that the plaintiffs made a tender of \$467.50 on the 16th November 1944, and one of \$157.95 on the 1st December 1944, and that such tenders were refused. The amount tendered included the two overdue instalments of principal, with interest and interest on interest, also the amount of an insurance premium of \$110, and costs amounting to \$37.50, and the tender was made within the ten days mentioned in the notice of sale. The offer was made to the defendant in legal tender. The sum of \$110 claimed by the mortgagee for fire insurance premiums was paid under protest.

Among the provisos contained in the mortgage and in The Short Forms of Mortgages Act, R.S.O. 1937, c. 160, is no. 16 of Schedule B referred to in s. 2 of the statute. The form of words in the mortgage is that set out in column 1, of the schedule under the number 16, and by virtue of s. 2(1) the mortgage has the same effect as if it contained the form of words in no. 16 of column 2 of the said schedule.

Proviso no. 16 of column 2 reads:

"16. Provided always, and it is hereby further expressly declared and agreed by and between the parties to these presents, that if any default shall at any time happen to be made of or in the payment of the interest money hereby secured or mentioned or intended so to be, or any part thereof, then and in such case the principal money hereby secured or mentioned, or intended so to be, and every part thereof, shall forthwith become due and payable in like manner and with the like consequences and effects to all intents and purposes whatsoever, as if the time herein mentioned for payment of such principal money had fully come and expired, but that in such case the said mortgagor, his heirs, executors, administrators or assigns, shall on payment of all arrears under these presents, with lawful costs and charges in that behalf, at any time before any judgment in the premises recovered or within such time as, by the practice of the Supreme Court, relief therein could be obtained be relieved from the consequences of non-payment of so much of the money secured by these presents, or mentioned, or intended so to be, as may not then have become payable by reason of lapse of time."

The intent of the first part of this proviso, down to the word "expired", is set out in the form of words in column 1. It is the meaning of, or the interpretation to be placed upon, the language of the latter part of the proviso, commencing with the words "but that in such case", that is material to the issue presented in the present action.

Light is thrown on the subject by the judgment of Rose J. in *Todd v. Linklater* (1901), 1 O.L.R. 103, affirmed by a Divisional Court. This was an action to restrain a mortgagee from taking proceedings under the power of sale in a mortgage.

The same acceleration clause of The Short Forms of Mortgages Act was under consideration. The headnote reads:

"The effect of the acceleration clause no. 16 schedule B. of the Act Respecting Short Forms of Mortgages . . . which provides relief from the consequences of non-payment of moneys not payable by reason of lapse of time is to give a right in every case to the mortgagor, his heirs and assigns, to pay all arrears and lawful charges, and the mortgagee has then no right to take

further proceedings, except where a judgment has been recovered."

In that case only the interest was in default and no part of the principal money was due by the terms of the mortgage. It was argued on behalf of the defendant that this judgment had no application to the present case because under the mortgage now under consideration not only interest, but instalments of principal as well, were overdue. The judgment, in my opinion, applies not only when interest alone is in arrear, but when arrears of instalments of principal have not been paid at the times fixed by the mortgage. Rose J. at p. 105, said:

"I think the effect of the clause is to give a right in every case to pay all arrears and lawful costs and charges, except where a judgment has been recovered."

It seems well settled that, apart from the statute, relief cannot be had by a mortgagor in circumstances such as are here present, for the reason that the case is one of contract and none of the principles of equity relating to relief in the case of penalties are applicable: *Clemmer v. Panton* (1922), 52 O.L.R. 211.

In *Schwartz v. Williams* (1915), 35 O.L.R. 33, 27 D.L.R. 733, Middleton J. said at p. 34:

"In *Todd v. Linklater* (1901), 1 O.L.R. 103, it was held that where under clause 16 of the Short Forms of Mortgages Act the mortgagor is entitled to relief, all the consequences of default are at an end, and the mortgagee has no right to exercise the power of sale."

In my view, the phrase "arrears under these presents" includes arrears of interest and arrears of principal which, by virtue of the terms of the mortgage itself, and not because of this proviso of the statute, became due and payable by lapse of time, and therefore were in default because not paid as required by the conditions set out in the mortgage. If all arrears payable under the mortgage are paid before judgment and within the time fixed by the Rules of Practice, the mortgagor is relieved from the consequences of non-payment of moneys secured by the mortgage which have become payable only because of this proviso in the Act. Money payable under the statute is not money payable because of lapse of time.

At the time the mortgage was given, the mortgaged premises were insured against loss by fire from the 31st January 1944,

to the 31st January 1947, to the amount of \$20,000 in The Western Assurance Company. This policy was assigned to the defendant with loss payable to the defendant as mortgagee. The secretary-treasurer of the defendant company testified that the defendant desired to insure the property in a company of its own choice, and on the 18th April 1944 a policy was obtained from the United Mutual Fire Insurance Company for \$20,000, which policy was replaced by one in the same company for the same amount taken out on the 30th August 1944. The defendant company merely notified the plaintiff that they had insured in the United Mutual company and requested the sum of \$110 to cover the amount of the premium. I find that the defendant did not ask the plaintiffs to have the Western Assurance Company policy, which had been assigned to it, cancelled, nor were the plaintiffs paid the unearned portion of the premium.

In *Morrow v. The Lancashire Insurance Company* (1899), 26 O.A.R. 173 it was held by the Court of Appeal that where an owner of property effected insurance thereon and subsequently mortgaged the property and assigned the insurance policy to the mortgagee, the policy could not be cancelled without notice to the mortgagor and payment to him of the unearned portion of the premium. My conclusion is that the defendant company is not entitled to be paid the \$110 charged against the plaintiffs for the premium payable on the policy placed by the defendant with the United Mutual company.

Rule 485 of the Rules of Practice provides for relief to a mortgagor from default in an action for foreclosure or sale, or for recovery of possession of a mortgaged property. When judgment was delivered in 1900 by Rose J. in *Todd v. Linklater*, *supra*, the acceleration clause in the Act respecting Short Forms of Mortgages, R.S.O. 1897, c. 126, then in force was in language identical with this clause in the present Act. Mr. Justice Rose was of the opinion that the effect of the clause of the statute was to give the right to a mortgagor, where proceedings had been taken under a power of sale, to pay all arrears, costs and charges except where judgment had been recovered and that the mortgagor had the benefit of Rules 388, 389 and 390. Rule 388 of the Rules of Practice of 1897, in force in the year 1900, is to the same effect as the present Rule 485.

The judgment in *The Ontario Loan and Debenture Company v. Gray et al.*, [1942] O.R. 471, [1942] 3 D.L.R. 239, cited by counsel for the defendant, has no application to the facts presented by the case at bar.

The notice of exercising power of sale was signed, not by the defendant company itself, but by its solicitors on its behalf. Counsel for the plaintiffs cited the case of *Ansell v. Bradley* (1916), 37 O.L.R. 142, 31 D.L.R. 297, in which it was held that the absence of the signature of the mortgagee to a power of sale of mortgaged lands was fatal. However, the facts in the present action are not on all fours with the facts in the *Ansell* case, and in *Fenwick v. Whitwam et al.* (1901), 1 O.L.R. 24, where the notice of sale was signed by the solicitor for the mortgagee, it was held that notice of sale dated and signed by a solicitor for the mortgagee was a proper notice. I hold that the notice of sale now under consideration was a proper notice.

The plaintiffs are entitled to be relieved from default upon payment to the defendant of the amounts tendered by them to the defendant as set out in the statement of claim, less \$110 charged for the insurance premium. The plaintiffs are entitled to a declaration that the insurance premium amounting to \$110 is not payable by the mortgagors. Proceedings under the power of sale are stayed as provided by Rule 485.

The plaintiffs are entitled to the costs of the action.

Judgment accordingly.

Solicitor for the plaintiffs: C. K. Waugh, Toronto (on active service).

Solicitor for the defendant: F. J. Sparham, Toronto.

[PLAXTON J.]

Knowlton v. The Village of Westport.

Municipal Corporations—Highway Maintenance—Liability for Non-repair—Notice of Injury and Claim—Effect of Failure to Give Notice within Prescribed Time—Distinction according to whether Action based on Negligence or on Gross Negligence in respect of Ice and Snow—The Municipal Act, R.S.O. 1937, c. 266, s. 480, subss. 1, 3, 4, 5.

Where an action for damages against a municipality is based upon an allegation of gross negligence, in respect of ice and snow upon a sidewalk, notice of claim and injury, given within the time prescribed by s. 480(4) of The Municipal Act, is an essential prerequisite to the action. Subss. 5 of s. 480 gives the trial judge no discretion, in respect of a claim of this nature, to relieve against the absence or insufficiency of the notice.

Where the claim is based on negligence in respect of a state of non-repair in the sidewalk (a distinct cause of action: *Fogg v. The Town of Kenora*, [1940] O.R. 421, applied), there is a discretion in the trial judge to relieve against want or insufficiency of the notice, but he should do so only if he is satisfied that the municipality has not been prejudiced in its defence, *e.g.*, by being deprived of an opportunity to investigate within a timely period after the happening of the accident, to ascertain the then condition of the *locus*, and to obtain competent witnesses who have had an opportunity of observing the conditions at the time. *Schoeni et al. v. King et al.*, [1943] O.R. 478 at 485, agreed with.

Where a plaintiff alleges gross negligence in respect of ice and snow upon a sidewalk, it is not sufficient to show that, although the sidewalk had in fact been sanded, there was a bare patch, where the plaintiff fell, on which there was no sand. There must be a flagrant or gross breach of the municipality's ordinary duty to keep its sidewalks reasonably safe. *Huycke v. The Town of Cobourg*, [1937] O.R. 682, applied; *Leeson v. The Village of Havelock*, [1940] O.R. 331, affirmed [1940] 4 D.L.R. 791; *Harper v. The Town of Prescott*, [1939] O.W.N. 492, affirmed [1940] S.C.R. 688, referred to.

AN ACTION for damages for personal injuries. The facts are fully stated in the reasons for judgment.

6th and 7th November 1944. The action was tried by PLAXTON J. without a jury at Brockville.

5th February 1945. PLAXTON J.:—This action is brought by the plaintiff to recover damages for injuries sustained by her as a result of a fall upon a sidewalk in the village of Westport, caused by the alleged negligence and gross negligence of the defendant and its workmen and servants in failing in its duty to keep the sidewalk in a safe condition for users thereof. The particular acts of gross negligence alleged are the following:

(a) failure on the part of the defendant to remove ice and snow from the sidewalk;

(b) failure on the part of the defendant to protect users of the sidewalk by applying sand or other protective coating thereto;

(c) the act of the defendant in applying a protective coating to a part of the sidewalk and omitting to apply sand on the part of the sidewalk on which the mishap occurred and thereby creating a trap for the plaintiff; and

(d) failure on the part of the defendant to warn the plaintiff of the unsafe condition of the sidewalk at the place where the mishap occurred.

The defendant denies any negligence on the part of the defendant, or of any person for whom the defendant was legally responsible. The defendant also denies that there was gross negligence on its part.

The defendant further alleges that if the plaintiff sustained injuries at the time and place alleged, such injuries were caused by the negligence of the plaintiff herself, and also that she had full knowledge of the risk she ran and voluntarily agreed to take the risk.

The defendant also pleads The Negligence Act, R.S.O. 1937, c. 115, and further pleads that it did not receive any notice in writing within the time limited by the statute in that behalf: The Municipal Act, R.S.O. 1937, c. 266, s. 480(4), (5).

The plaintiff is the widow of a farmer, residing on a farm near the village of Newboro, some seven or eight miles from the village of Westport. She is sixty-two years of age. She has been in the habit of visiting the village of Westport three or four times a year. On 25th January last, paying her first visit to that village in 1944, the plaintiff proceeded by bus to the village to do some shopping. She got off at the post office, crossed the street to the north side, and proceeded to walk westerly along the sidewalk towards Blair's grocery store. The sidewalk was covered, she testified, with two or three inches of snow over glare ice. There had been no snowfall since the day before. The day was fair. It was freezing but not very cold. She testified that she noticed sand on the sidewalk mixed with the snow. It provided a gritty surface. This state of things continued up to the point where she fell. She had proceeded along the sidewalk about half a block, or a distance of some forty-seven feet, when she arrived at a section of the sidewalk in front of the home and office of W. M. Ewart, K.C. On this section of the sidewalk, she swore, she saw only a covering of white snow with an unbroken surface; there was no sand mixed with the snow.

Underneath the snow was glare ice. Her feet slipped from under her and she fell with great force on her left arm towards the steps in front of Mr. Ewart's house, sustaining a compound fracture of both bones two or three inches above the wrist. One bone protruded through the flesh. The plaintiff further testified that she was, at the time of the accident, wearing a pair of rubber-soled goloshes which were almost new. The accident occurred between 12.15 and 12.30 o'clock p.m.

Three or four weeks after she had returned home from the hospital, the plaintiff says, she visited the scene of the accident to ascertain if there was any drip from the eave-trough—presumably on Mr. Ewart's house. In examination-in-chief, she said she had visited the place of the accident "lately" before the trial and then learned that the section of the sidewalk on which she had fallen was depressed about one inch in relation to the adjoining sections of the sidewalk and sloped towards the curb. She was examined for discovery on 16th October 1944, just three weeks before the trial. She admitted in cross-examination that she then knew of the depressed condition of section 8 of the sidewalk as shown on the plan Ex. 3. Yet, there are these questions and answers which were read to her by Mr. Hughes and which she did not attempt to impugn:

"50. Q. How did you fall, Mrs. Knowlton? A. My feet slid.

"51. Q. Went forward? A. Slid forward and I fell on this forearm.

"52. Q. You fell to the left? A. Yes.

"53. Q. On your left arm? A. Yes.

"54. Q. Is the sidewalk perfectly level along that spot, Mrs. Knowlton? A. I don't know whether there's any breaks or a raise in it or not. I don't think so.'

"55. Q. There is no grade or dip? A. No, I can't say that there was."

"103. Q. Mrs. Knowlton, what do you say that the negligence of the village of Westport consisted of? A. What do I say that it consisted of? I would say that they were negligent. Whoever did the sanding certainly skipped it in spots. I'd say that place—I know that area there—that's all I'd vouch for—hadn't been sanded. That I know. If the whole area of the sidewalk hadn't have been sanded I'd have been You walk along and if you see there is no sand on the sidewalk you are

doubly careful, but the fact that the sidewalk had been sanded and then that spot took me all unprepared, that's what deceived me. If it had been all neglected you would have been looking. I wasn't hurrying but when I struck that piece of sidewalk with that much snow and glare ice underneath.

"104. Q. What do you mean by 'glare ice'? A. Ice that has no sand on it at all. Just ice with a deceiving coat of snow over it.

"105. Q. Was it smooth? A. Underneath it was smooth.

"106. Q. The ice in front of Mr. Ewart's underneath the snow was perfectly smooth? A. It must have been absolutely smooth because of the way I skidded on it.

"107. Q. Not what it must have been, Mrs. Knowlton. Do you remember that it was smooth? A. Yes. It had enough snow over it until you wouldn't know there was ice underneath it because there was that much snow over the top of it.

"108. Q. You are indicating again about two inches? A. Yes.

"109. Q. You didn't, or did you, Mrs. Knowlton, pass over this sidewalk very often in the winter? A. It wouldn't be like my own home town where I would be going out every day. I never remember ever having that experience before in Westport but, as I say, I am not there very often. It isn't like a piece of walk you are going over all the time."

As a result of her accident the plaintiff was confined in the Brockville hospital seven and one-half weeks. She was attended by Dr. C. M. Bracken, who testified that he had assisted Dr. W. J. Gibson to reduce the fracture, having for this purpose to make an open reduction and to apply traction. Dr. Bracken testified that for five or six weeks the plaintiff had suffered considerable pain and there was a lot of contusions and swelling. The plaintiff was in bed two weeks and wore a metal cast on her arm for a period of five weeks. Then an aluminum cast was applied. She still had it on when she left the hospital to go home. She testified that her arm did not bother her for carrying things, but that she could not lift any weight with it. She was now able to carry on her household duties.

Andrew W. Gray, of Brockville, a civil engineer and Ontario Land Surveyor, prepared a plan of part of the cement sidewalk in the village of Westport now in question. This plan is Ex. 3.

It was prepared as a result of a survey made on 4th November 1944, and on this plan the portion of the sidewalk on which the plaintiff testified she had fallen is designated section 8. Mr. Gray testified that he had ascertained by his survey, as appears from the plan, that section 8, at its south-east corner, was $1\frac{1}{2}$ inches, and at its south-west corner, 2 inches, lower than the adjoining sections, numbered 7 and 9 respectively. Section 8 was also patched in its north-west corner and had a diagonal crack in it as shown on the plan. The crack, Mr. Gray stated, was pretty well filled in. Also there was a space of three-quarters of an inch between sections 7 and 8. The west edge of section 8 was frayed and there was also a space between that section and section 9 of the sidewalk. The plan includes a profile of the elevation of the sidewalk. From the bench mark shown on the plan to the centre of section 8 of the sidewalk, a distance of forty-five feet, there was a slope to that point of six inches. The part of the profile coloured yellow shows the loss in elevation from sta. 0 35 to sta. 0 60. The earth on the north side of section 8, Mr. Gray testified, slopes down to the pavement.

Mr. Hughes objected to the admissibility of Mr. Gray's evidence on the ground that it had no relevancy at all to the condition of the sidewalk at the crucial date, that is the date of the accident, 25th January 1944, and at any rate, for the same reason, lacked weight. The evidence of Mr. Gray was admitted subject to that objection.

No evidence was adduced on behalf of the plaintiff beyond her own evidence, as summarized above, as to the condition of the sidewalk at the date of the accident, 25th January 1944, nor was any evidence introduced on behalf of the defendant. Mr. Hughes did, however, read into the evidence certain questions and answers from the plaintiff's examination for discovery, namely, qq. 54, 55, 103, 104, 105 and 106. These have been already quoted above.

Mr. Hughes argued first that the plaintiff had not complied with the statutory provisions respecting notice of claim and injury. For the purpose of considering this defence and the argument made on behalf of the plaintiff in answer to it, it will be convenient to set out the relevant provisions of The Municipal

Act, R.S.O. 1937, c. 266, s. 480(1), (3), (4), (5). They read as follows:

“(1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default the corporation shall subject to the provisions of *The Negligence Act* be liable for all damages sustained by any person by reason of such default.

“(3) Except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk.

“(4) No action shall be brought for the recovery of the damages mentioned in subsection 1 unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the head or the clerk of the corporation, in the case of a county or township within ten days, and in the case of an urban municipality within seven days after the happening of the injury, nor unless where the claim is against two or more corporations jointly liable for the repair of the highway or bridge, the prescribed notice was given to each of them within the prescribed time.

“(5) In the case of the death of the person injured, failure to give notice shall not be a bar to the action and except where the injury was caused by snow or ice upon a sidewalk, failure to give or insufficiency of the notice shall not be a bar to the action, if the court or judge before whom the action is tried is of the opinion that the corporation in its defence was not prejudiced by the want or insufficiency of the notice and that to bar the action would be an injustice, notwithstanding that reasonable excuse for the want or insufficiency of the notice is not established.”

The expression “urban municipality”, as defined for the purposes of the Act by s. 1(v), means and includes, *inter alia*, a village.

In this case, the notice of claim and injury was sent by the plaintiff's solicitor by registered post to the clerk of the defendant corporation. It was dated 12th February 1944, and the certificate of post-office registration indicates that it was posted on the same day at Brockville, Ontario. The notice, which is Ex. 2, reads as follows:

"12th February, 1944.

"Mr. E. J. McCaffrey,
Clerk of the Village of Westport,
WESTPORT, Ont.

"Dear Sir:

"We beg to advise that we have been retained by Mrs. Sybil Knowlton, wife of J. N. Knowlton, Newboro, Ontario, to represent her in connection with injuries sustained as a result of falling on the sidewalk in front of Mr. Ewart's home on January 25th, 1944.

"Take notice that Mrs. Knowlton claims to be entitled to compensation from the municipal corporation of the Village of Westport as her injuries resulted from the gross negligence on the part of the municipality in failing in its duty to protect our client and to keep the sidewalk and ice and snow thereon in a condition of safety.

"Take notice also that our client suffered a compound fracture of the left arm and has been confined to the Brockville General Hospital since the date of the accident and was unable to give the required notice at an earlier date.

"Yours truly,

"LEWIS & BEALE,

"PER (G. A. Beale)"

"GAB/ES

"Registered mail."

No evidence was adduced in support of the statement, set out in the last sentence of the notice, that the plaintiff "was unable to give the required notice at an earlier date", except her own evidence and that of Dr. Bracken to the effect that she was confined in the hospital on account of her injuries for some seven and one-half weeks following the date of the accident. There was, for instance, no evidence adduced to prove that she was incapacitated from discussing business affairs, or was unable to give instructions for the notice. The fact of the matter is that she did give instructions for the sending of the notice on 12th February, eighteen days after the accident occurred.

It will be observed that, by this letter, the defendant municipality was given notice by the plaintiff only of a claim for compensation for injuries alleged to have resulted from "the gross negligence on the part of the municipality in failing in

its duty to protect" her "and to keep the sidewalk and ice and snow thereon in a condition of safety."

By her statement of claim, however, the plaintiff alleges that her injuries were caused as a result of the negligence as well as the gross negligence of the defendant and its workmen and servants, "in failing in its duty to keep the sidewalk in a safe condition for users thereof." It was argued on her behalf that her claim was two-fold in that it was founded on an allegation of negligence on the part of the defendant in respect of a state of non-repair of the sidewalk at the place where she fell—a distinct cause of action under the decision of the Court of Appeal in *Fogg v. The Town of Kenora*, [1940] O.R. 241, [1941] 1 D.L.R. 100—as well as on an allegation of gross negligence on the part of the defendant in respect of its failure to remove the ice and snow from the sidewalk, or to protect the users of the sidewalk by applying sand or other protective coating thereto.

There is no specific reference, either in the plaintiff's notice of claim and injury of 12th February 1944 or in the statement of claim, to any alleged state of non-repair of the sidewalk at the *locus in quo*. It would, therefore, appear that so far as the plaintiff's claim rests upon an allegation of negligence in respect of non-repair of the sidewalk at the place where she fell, the defendant did not receive any notice of it until the point was raised in argument at the trial. It may be doubtful—and I am disposed to think that it is—that the plaintiff's notice of claim and injury, or her statement of claim, covers any claim based upon alleged negligence of the defendant corporation in respect of a state of non-repair of the sidewalk at the place where the plaintiff fell. I am, however, willing to assume, for the purpose of the case, without deciding, that such a claim has been properly asserted by the plaintiff's notice of claim and injury, and has been adequately pleaded by her statement of claim.

Insufficiency of the notice of claim and injury given by the plaintiff to the defendant is, under the terms of subs. 5 of s. 480 of The Municipal Act, plainly a bar to the plaintiff's action in so far as her claim to compensation is founded upon the allegation that the defendant was guilty of gross negligence, because that allegation is, by the terms of para. 3 of the statement of claim, explicitly linked up with her complaint that "the

injury was caused by snow or ice upon a sidewalk". In respect of such a claim, the trial judge is, by that enactment, given no discretion to afford the plaintiff relief from the consequences of the want or insufficiency of the notice of claim and injury.

There remains, however, the plaintiff's claim that her injuries were caused by the negligence of the defendant in respect of an alleged state of non-repair of the sidewalk at the *locus in quo*. As to that branch of her claim, it was suggested that this was a case in which the trial judge could properly give the plaintiff relief against the consequences of an insufficient notice of her claim and injury, under the terms of subs. 5 of s. 480, in that he would be justified in expressing "the opinion that the corporation in its defence was not prejudiced by the want or insufficiency of the notice and that to bar the action would be an injustice, notwithstanding that reasonable excuse for the want or insufficiency of the notice is not established."

I do not agree. What is now subs. 5 of s. 480 was amended by 1936, c. 39, s. 30, presumably as a result of the suggestions made by the learned justices of the Court of Appeal in *Trussler v. The City of Kitchener*, [1936] O.R. 53, [1936] 1 D.L.R. 100. The subsection, thus amended, was the subject of consideration by Roach J. in *Schoeni et al. v. King et al.*, [1943] O.R. 478 at 485, [1943] 4 D.L.R. 536 at 543-544:

"Subs. 5 of s. 480 was enacted in 1936, and decisions in earlier cases are not particularly helpful. Notice within the prescribed time gives to a municipal corporation an opportunity to investigate the source of the accident, the place where it happened and the circumstances under which it happened. The greater the lapse of time between the happening of the occurrence and the investigation, the less is the opportunity of the servants of the corporation to investigate, and there may come a time when all opportunity to investigate is lost. I can understand a case in which the municipality had actual notice of the accident from sources other than the person injured, and thereby an opportunity to investigate—an opportunity which it seized upon notwithstanding the failure of the claimant to give such notice himself. In such a case, it might well be argued that failure to give the statutory notice did not prejudice the corporation in its defence. But that is not this case . . . by reason of the failure of the claimant to give the statutory notice, and

the fact that the corporation did not otherwise have notice of the accident, it is deprived of the opportunity, by investigation, to challenge or test the statements later given in evidence on behalf of the claimant as to the place where, the time when, and the circumstances in which, the occurrence happened This subject is discussed fully in *Carmichael et al. v. The City of Edmonton*, [1933] S.C.R. 650, [1934] 1 D.L.R. 197."

I respectfully adopt the foregoing passage of the learned judge's judgment. In the case at bar, no evidence was adduced to show that the defendant, through its officers or servants, had actual notice of the plaintiff's accident until it received the notice of claim and injury on 12th February 1944 (Ex. 2), still less any notice of any complaint on her part of an alleged state of non-repair of the sidewalk at the place where the accident occurred. I am not satisfied that the defendant corporation, in its defence, was not prejudiced by the insufficiency of the plaintiff's notice of claim and injury. Eighteen days elapsed between the occurrence of the accident and the sending of the notice. The defendant was thus deprived of any opportunity of inspecting the *locus in quo*, or of having it inspected within a timely period after the happening of the accident, of ascertaining the then condition of the sidewalk and of obtaining competent witnesses who had opportunity of observing the conditions at the locality in question on or before the day of the accident.

For the foregoing reasons alone, I have concluded that the action must be dismissed.

However, I feel bound to add that, even if it were conceded in the plaintiff's favour that she had given sufficient notice of her claim and injury to the defendant, the action would nevertheless, on the merits, fail. In respect of a claim founded upon alleged gross negligence on the part of a municipal corporation, Fisher J.A., delivering the judgment of the Court of Appeal in *Huycke v. The Town of Cobourg*, [1937] O.R. 682, [1937] 3 D.L.R. 720, said, at pp. 689-90:

"The onus is on the plaintiff to prove strictly that there was gross negligence, and gross negligence has been defined in *Corporation of the City of Kingston v. Drennan* (1896), 27 S.C.R. 46, at p. 60, as meaning 'very great negligence'. The law is well-settled that if a municipality permits a slippery, icy sidewalk in a thickly peopled part of the municipality to remain

unprotected or ignores it altogether, and some one is injured, that would constitute gross negligence. But, in my opinion, if a municipality has given ordinary and careful attention by sanding and, notwithstanding, an accident happens, if there was any negligence it would not be gross but ordinary, and if ordinary, under the statute no liability.

"The object of the Legislature in passing the enactment that gross negligence must be proved, was, I think, to confine the liability of a municipality to cases where the municipality was guilty of a flagrant or gross breach of its ordinary duty—and not an extraordinary duty—to keep its sidewalks reasonably safe for pedestrians using them".

See also, as to what constitutes gross negligence, *Leeson v. The Village of Havelock*, [1940] O.R. 331 at 343, 344, [1940] 3 D.L.R. 665 (affirmed [1940] 4 D.L.R. 791), per Gillanders J.A.; *Harper v. The Town of Prescott*, [1939] O.W.N. 492, [1939] 4 D.L.R. 453 (affirmed [1940] S.C.R. 688, [1940] 4 D.L.R. 225), per McTague J.A.

On the plaintiff's own evidence, the portion of the sidewalk in the defendant municipality which she traversed was sanded up to the particular section of the sidewalk on which, according to her evidence, she fell. Up to that point, sand was mixed with the snow and, to use her expression, provided "a gritty surface". On the section of the sidewalk on which she fell, according to her testimony, she noticed only an unbroken surface of white snow with no sand mixed in it.

On this evidence, I am unable to conclude that the defendant municipality was not reasonably taking care of its sidewalks. It had actually sanded this particular one, though at what time the evidence adduced at the trial did not disclose. The plaintiff's complaint really amounts to this, that there was no sand on the sidewalk at the particular spot at which she fell. I think this evidence falls short of what is required, under the decisions, to establish gross negligence on the part of the defendant municipality.

A similar point was dealt with by the Court of Appeal, in *Huycke v. The Town of Cobourg*, *supra*, at pp. 691-2, where Fisher J.A. said:

"Everyone using a slippery sidewalk takes on a certain amount of risk, and it is unreasonable to hold that every time

a person slips and is injured liability must attach to a municipality. If the municipality follows—and I find the defendant did in this case—the usual custom or system in dealing with the ice conditions upon their sidewalks by sanding, and in doing so, a small space happens to have been missed, or if the sand did not stick or adhere to the sidewalk, or if the sand or part of it had been blown away or thinned out or disturbed by pedestrians, I am of opinion that gross negligence would not follow if a pedestrian happened to slip and was injured. All that the plaintiff and her witnesses were positive about is that there was no sand on the spot where the plaintiff fell. . . . It would be an intolerable situation and a financial burden that no municipality could stand if a municipality is to be found guilty of gross negligence because, in the course of scattering sand upon all the slippery sidewalks within its boundaries, a small spot should happen to have been missed, and upon that spot some one fell and was injured. To so hold would be virtually to make a municipality an insurer of pedestrians against any possibility of injury, and that is not the law: *Bleakley v. Corporation of Prescott* (1886), 12 O.A.R. 637. Municipalities are not insurers of the safety of pedestrians using their sidewalks: *Boyle v. Corporation of Dundas* (1875), 25 U.C.C.P. 420.”

In regard to the plaintiff's claim that her injuries were caused by the negligence of the defendant in respect of an alleged state of non-repair of the sidewalk at the *locus in quo*, I am of opinion that her action, on the merits, equally fails.

The witness, Mr. Gray, made a survey of the sidewalk at the *locus in quo* on 4th November 1944. His evidence, confirmed by his plan of survey (Ex. 3), is to the effect that section 8, which was identified to him by the plaintiff as the place where her accident had occurred, was depressed at one side two inches, and at its other side, one and one-half inches, in relation to the adjoining sections of the sidewalk.

As already stated, I admitted his evidence subject to objection by Mr. Hughes. I am disposed to agree that his evidence, if admissible at all, is without relevancy or weight as to the condition of the sidewalk at the date of the accident, *viz.*, 25th January 1944. The condition of things may have changed radically between that date and the date on which the survey was made. The testimony of the plaintiff herself is at variance with

any suggestion that the section of the sidewalk on which she fell had any dip or uneven surface. In her examination for discovery, asked whether the sidewalk was perfectly level at the spot where she fell, she said, "I don't know whether there is any breaks or a raise in it or not, I don't think so." (Q. 54). And also asked whether there was any grade or dip, she answered, "No, I can't say that there was." (Q. 55).

I am of opinion that the plaintiff's evidence entirely fails to establish any state of non-repair of the sidewalk at the place where, and at the date, her accident occurred.

For the foregoing reasons, the action is dismissed, with costs, but I express the hope that the municipality will, under the circumstances of the case, see fit to forego their costs against the plaintiff.

Action dismissed with costs.

Solicitors for the plaintiff: Lewis & Beale, Brockville.

Solicitors for the defendant: Hughes, Agar, Thompson & Amys, Toronto.

[COURT OF APPEAL.]

Re Halliday; The City of Ottawa v. The County of Elgin.

Infants—Maintenance of Neglected Children—Liability of Municipality—Residence of Mother—Service in Armed Forces—The Children's Protection Act, R.S.O. 1937, c. 312, s. 10(2), (3).

A woman who has enlisted in the armed forces of His Majesty is "resident", within the meaning of s. 10(2) of The Children's Protection Act, where she is stationed on the orders of her superiors, notwithstanding that she may not have herself gone voluntarily to that place. *Robertson v. M'Millan* (1943), 59 Sher. Ct. Rep. 12; *Findlay v. Donachie*, [1944] Sc. L.T. 367; *Martin v. Szyszka*, [1943] S.C. 203, agreed with; *Ford v. Hart* (1873), L.R. 9 C.P. 273; *Stoke-on-Trent Borough Council v. Cheshire County Council*, [1915] 3 K.B. 699; *Berkshire County Council v. Reading Borough Council*, [1921] 2 K.B. 787, applied.

AN APPEAL by the City of Ottawa from an order of the Family Court at Toronto, finding the appellant liable for the maintenance of a neglected child. The facts are stated in the reasons for judgment.

7th February 1945. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW JJ.A.

G. C. Medcalf, K.C., for the appellant: The question for determination is to what municipality this child belongs. Can

"residence" be established under The Children's Protection Act, R.S.O. 1937, c. 312, while the mother is in one of His Majesty's services? [ROBERTSON C.J.O.: The point is whether the mother "resides" where she is stationed as a member of the armed services?] Yes, and our submission is that she does so reside. [LAIDLAW J.A.: If a woman, having an established residence in municipality A, in Ontario, and intending eventually to return there, goes to another Province and lives there for more than a year, and later returns to Ontario and goes to municipality B, and there gives birth to a child, which municipality is liable?] In that case, B would be liable, under s. 10(5), as re-enacted in 1937. [ROBERTSON C.J.O.: The Act does not use the word "residence"; it is where the mother "resided".]

The 1937 re-enactment of s. 10(2) makes the earlier decisions inapplicable, and the statute must be construed exactly as it is expressed.

In 1940, by c. 23, s. 2, and c. 28, s. 24, the Legislature amended The Public Hospitals Act, R.S.O. 1937, c. 390, s. 23, and The Sanatoria for Consumptives Act, R.S.O. 1937, c. 395, s. 43, to clarify similar questions of residence in the case of members of the armed forces, but no corresponding amendment was made to The Children's Protection Act. At that time there were of course no women in the armed forces.

Re Campbell, [1944] O.W.N. 242, [1944] 2 D.L.R. 58, [1944] 3 D.L.R. 34, is of no assistance, since it determines that the decisive time, as to liability for maintenance, is the time at which the child becomes neglected, irrespective of when it is so declared. *Toronto Free Hospital for Consumptives v. Town of Barrie* (1917), 39 O.L.R. 63 at 67, 34 D.L.R. 691, decided under The Hospitals and Charitable Institutions Act, R.S.O. 1914, c. 300, shows that there need not be a voluntary choice of residence. I refer also to the following cases, discussing the meaning of "reside" and "residence" in other statutes: *Stoke-on-Trent Borough Council v. Cheshire County Council*, [1915] 3 K.B. 699; *Leicester Corporation v. Stoke-on-Trent Corporation* (1918), 88 L.J.K.B. 836; *Berkshire County Council v. Reading Borough Council*, [1921] 2 K.B. 787.

The fact that this construction of the statute may work an apparent injustice is not a reason for refusing so to construe it: *Re Bartlett*, [1944] O.W.N. 228, [1944] 2 D.L.R. 527.

F. C. Forster, for the respondent: At the time the mother of this neglected child enlisted in the Air Force at Ottawa she had a residence in Ottawa. It has been held that domestic service, though broken, constitutes residence at a particular place: *Re Amey*, [1936] O.W.N. 369, [1936] 4 D.L.R. 129. Here, a definite residence has been established for this girl as a civilian. One must take the word "reside" in its ordinary meaning; a person makes a choice as to where he will eat, sleep and carry on the usual business of living. There must be some place of abode as to which such a person has some choice. [ROBERTSON C.J.O.: You are suggesting that the nature of the residence must be such that she has a choice, and has chosen to stay there.] To be a resident, she should have a stake in the community; her status in the Air Force did not allow her a choice as to where she was going to be sent. [ROBERTSON C.J.O.: This person on enlisting might have been in the position of a tramp, shifting from place to place.] She could never change the permanent character of her former residence. Certainly it could not be changed by a mere expression of intention to become resident elsewhere. She must have a certain fixed place of abode. This particular type of person is not contemplated by the statute, and up to the present there have been no cases on this particular point.

G. C. Medcalf, K.C., in reply: One cannot apply cases on divorce to the present situation. In divorce actions the question for determination is the domicile of the parties—quite a different matter.

Cur. adv. vult.

22nd February 1945. The judgment of the Court was delivered by

GILLANDERS J.A.:—The Corporation of the City of Ottawa appeals from an order made by the judge of the Family Court of the city of Toronto under The Children's Protection Act, in so far as it imposes liability on the appellant municipality for the maintenance of Kathleen Halliday, a neglected child.

The facts are simple and are not in conflict. Margaret Halliday, the mother of the child in question, was born in the town of Pembroke, in the county of Renfrew, on 14th February 1920. Except for a short period in the spring of 1939, when she took

a course of training in domestic work in Ottawa, she resided at Pembroke with her parents until 1st May 1940, when she went to Ottawa and entered domestic employment. In Ottawa she lived in the homes of the persons by whom she was employed, till October 1941, a period of approximately eighteen months.

In October 1941 she enlisted in the Women's Division of the Royal Canadian Air Force. She was sent almost at once to Toronto and took training there and at several other places for short periods until June 1942, when she was posted to the R.C.A.F. station at Fingal, in the county of Elgin. There she remained in the course of her duties in the R.C.A.F. till the end of January 1944, a period of approximately nineteen months, when she was discharged after it was discovered that she was pregnant.

On her discharge from His Majesty's service she came to Toronto, where the child Kathleen Halliday was born on 19th June 1944.

The child has been found to be a neglected child and the question arises what municipality is liable for its maintenance under the provisions of The Children's Protection Act, R.S.O. 1937, c. 312.

The answer to this question cannot be found by applying the test indicated by s. 10(2), relating to the last residence of the child for a period of one year, since the child, being less than one year of age, has not itself acquired the necessary residence for one year in any municipality.

One must therefore consider how the question should be answered based on the residence of the mother, as indicated in s. 10(3).

Undoubtedly the mother resided in Ottawa for more than a year prior to enlistment in the R.C.A.F., and thereafter in the course of her duties was stationed within the county of Elgin for a period in excess of one year. The sole question raised on the appeal was whether or not, within the meaning of the statute, she resided within the county of Elgin while stationed there as a member of one of His Majesty's services.

On the argument I was inclined to the view that the learned Family Court Judge was right in holding that under the circumstances she could not be said to have established a residence

in Elgin within the meaning of the Act while stationed there under orders as a member of the armed forces, but subsequent consideration and examination of the relevant authorities indicates that that view cannot prevail.

The word "reside" is not defined in the statute, nor does the statute specifically indicate that the word is used in any restricted or limited sense, unless the time in question falls within the periods to be excluded by subs. 4 of s. 10 in fixing the period of residence. I think it may be observed at once that the period spent by the mother in the armed forces does not fall within any of the periods to be disregarded, as provided by that subsection. One is therefore thrown back on the proper application of the term as used in the statute.

"The word 'reside' is very flexible and has more than once been said to be incapable of exact definition. The duty of the Court in interpreting any statute where the word is found is to attribute to it such meaning as will best give effect to the legislative will": per Middleton J. in *City of Ottawa v. Nantel* (1921), 51 O.L.R. 269, 69 D.L.R. 427. See also *Re Campbell*, [1944] O.W.N. 242, [1944] 2 D.L.R. 58.

The precise point under the statute in question has apparently not been passed upon, but the interpretations placed on similar words in other statutes are helpful.

In the old case of *Ford v. Hart* (1873), L.R. 9 C.P. 273, the point to be decided was whether a soldier, absent from his home and prior residence on duty, except when on leave, was still constructively resident, for the purpose of being entered on a voters' list, at the home of his mother where rooms were always reserved for him and where he returned when on leave. In holding that the claimant did not have a constructive residence at his mother's home it was not necessary to indicate whether or not he was resident where he was stationed on duty, but in the course of his judgment Brett J. said: "Here the respondent was actually living, and sleeping, and doing all that constitutes residence more than seven miles from the borough at the barracks." *Vide* also *Stoke-on-Trent Borough Council v. Cheshire County Council*, [1915] 3 K.B. 699, which concerned the construction of the words "place of residence of a youthful offender" in a statute. In the course of his judgment, Lord Reading C.J. says: "In my judgment a youthful offender is,

within the meaning of the section, resident where he lives, that is where he has his bed, and where he dwells." To the same effect Ridley J.: "The place of residence of a person is the place where he eats, drinks, and sleeps."

To the same effect is *Berkshire County Council v. Reading Borough Council*, [1921] 2 K.B. 787, which was a case arising out of an order declaring a person to be a mental defective.

Some similar questions have recently arisen in Scotland. *Robertson v. M'Millan* (1943), 59 Sher. Ct. Rep. 12, was an action in which the plaintiff sought a decree for the aliment of her illegitimate child against the defendant, a soldier who was alleged to be the father. In order to give the Court jurisdiction it was necessary that the defendant be resident within the jurisdiction of the Court. It was contended that the defendant, being a soldier and compulsorily within the jurisdiction on duty with his unit, could not be said to reside therein within the meaning of the statute there in question. It is pointed out that the word used is "reside" and not "domicile". Sheriff Grierson said: ". . . there is nothing in the Act to suggest that it was intended to have any special or peculiar meaning. In itself the word 'reside' is not restricted to 'voluntarily reside' and residence does not require domiciliary intention but the actual fact of physical presence for a substantial length of time within the reach of the control of the Court. If that be so, jurisdiction is founded upon the defender's residence even if the residence is not voluntary."

Findlay v. Donachie, [1944] Sc. L.T. 367, was also an action for filiation and aliment brought in Dundee, Scotland. The defendant was a conscript soldier then serving with his unit in England. Prior to his being called up for military service his home and residence had been at Dundee and his wife continued to reside in the home there. The question for the Court in that case was whether or not the defendant should be viewed as resident at Dundee. The case went to the Court of Session. For the plaintiff it was urged that the soldier should be viewed as resident at Dundee at his home address. The wife lived there, and it was urged that in determining the residence *animus remanendi* must be taken into consideration, and that he was not resident where stationed under orders and not in the exercise of his own choice. For the defendant it was urged that the idea of residence connoted physical presence. The Court held

in effect that the physical presence of the defendant in England made him resident there. In the course of his judgment the Lord President quotes with approval from *Martin v. Szyska*, [1943] S.C. 203. In that case the judgment, after expressing the opinion that the admitted fact that the soldier there concerned had been stationed within the jurisdiction of the Court for the period of residence required by the statute there being considered was sufficient to constitute the residence required, continues: "The only objection urged by Mr. Watt against the acceptance of this view was that, being a member of an armed force, the defender was not in a position voluntarily to select of his own free will and caprice the place where his 'residence' should be. In emphasising, as Mr. Watt did, and as I think the Sheriff-substitute did, the element of free choice and *animus* in relation to the subject of 'residence' as a ground for jurisdiction, I cannot but think that he was confusing what is frequently called 'forensic domicile' for the purposes of jurisdiction with that wide 'domicile of succession' with which we are familiar in another connection and which depends as much upon *animus* as upon *factum*. It may be that there are certain categories of persons who suffer or have incurred total forfeiture of personal liberty—for instance, by a sentence of imprisonment—with regard to whom special considerations may arise in dealing with the question of their 'residence' for purposes of jurisdiction; but this is not such a case."

The whole trend of authority indicates that the proper conclusion here is that Margaret Halliday must be viewed as having resided within the county of Elgin while stationed there on duty with the R.C.A.F., and that liability for the maintenance of the neglected child must therefore fall on that municipality.

It might be thought that the result is inequitable, but, as pointed out by Robertson C.J.O. in *Re Bartlett*, [1944] O.W.N. 228, [1944] 2 D.L.R. 527, "It may be that in some circumstances the statute will operate unfairly".

In the result the appeal must be allowed with costs here and below.

Appeal allowed with costs throughout.

Solicitor for the appellant: Gordon C. Medcalf, Ottawa.

Solicitors for the respondent: Sanders and Sanders, St. Thomas.

[COURT OF APPEAL.]

Rex v. Brosig.

Criminal Law—Extent of Application—Liability of Prisoner of War to Proceedings in Ordinary Courts—Attempt to Escape.

The Geneva Convention of 1929 respecting the treatment of prisoners of war clearly contemplates that proceedings may be taken against prisoners of war in the civil (*i.e.*, non-military) courts of the detaining Power, their position being assimilated in this respect to that of the armed forces of the detaining Power. A prisoner of war in Canada is therefore liable to be prosecuted and convicted, in the ordinary criminal courts, for any breach of the law committed by him, at least where it is found that his acts are not part of or incidental to an escape.

The accused, a German prisoner of war, escaped from the camp in which he was held by concealing himself in a mail-bag, which was taken out of the camp and put upon a train. On the train, the accused got out of the mail-bag and opened another bag, taking out parcels from which he removed, *inter alia*, cigarettes and chewing gum. The magistrate found as a fact that the cigarettes and gum were taken for the accused's own comfort, and would not assist his escape.

Held, in these circumstances, and with this finding of fact, the accused should be convicted on a charge of stealing from the mails.

AN APPEAL by the Crown from the judgment of a magistrate, dismissing a charge. The facts are stated in the reasons for judgment of GILLANDERS J.A.

12th September 1944. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and GILLANDERS J.J.A.

J. J. Robinette (*W. M. Flannery* with him), for the Crown, appellant: Prisoners of war are subject to the ordinary criminal law, and it makes no difference whether or not the crime they commit is designed to assist their escape. If there is any distinction in this respect, the magistrate has found that the cigarettes and chewing gum were taken for the accused's own comfort, and were not necessary to aid his escape. [ROBERTSON C.J.O.: The word "escape" may be used in two senses, as meaning escape from confinement or escape from the country. In which sense are you using it?] In this connection, we mean escape from the military authorities, but the finding of fact is broad enough to cover it in the wider sense. [ROBERTSON C.J.O.: The magistrate seems to be using it in the wider sense.]

The domestic authorities, if they so desire, may make a prisoner of war subject to the ordinary criminal law anywhere in Canada, even in the prison camp. [GILLANDERS J.A.: Subject, of course, to the provisions of the Geneva Convention.] Yes. Subjection to the criminal law is based, not on allegiance, but on *de facto* presence in the country. [ROBERTSON C.J.O.: There

is no question here, is there, of liability for acts done within the camp?] No.

It appears from *Re Exemption of Members of the Military or Naval Forces of the United States of America from Criminal Proceedings in Canadian Courts*, [1943] S.C.R. 483, 80 C.C.C. 161, [1943] 4 D.L.R. 11, that anyone within Canada is subject to the restrictions of the criminal law, unless a change is made by international agreement. In international law, Canada has not waived its right to prosecute prisoners of war in the ordinary courts.

The Geneva Convention relative to the Treatment of Prisoners of War, 1929, shows that all parties contemplated that a prisoner of war might be prosecuted in the ordinary courts: see Chapter 3 of Section V, Part III, particularly arts. 45, 51, 52, 53. Head 3 of this chapter deals specifically with judicial proceedings.

None of the cases is directly in point, but they all indicate a trend in favour of our position. We refer to *Reg. v. Sattler* (1858), Dears. & B. 525 at 539, 542, 543, 169 E.R. 1111; *Reg. v. Serva et al.* (1845), 1 Den. 104 at 125, 169 E.R. 169; *The Government and People v. McGregory et al.* (1780), 14 Mass. 499; *Molieres' Case*, Foster's Crown Law, p. 188n. [ROBERTSON C.J.O.: Of course the facts in *Molieres' Case* are fundamentally different from the present one. There it was a "private" theft. The theory put forward against your contention has always been that it is the duty of a prisoner of war to escape, and that he is therefore no more liable for anything he may do in performing that duty than he would be for an act done during an actual battle.] The fallacy of that argument, and of the position taken by the magistrate here, is that the Geneva Convention definitely rejects the contention that a prisoner of war, who considers it to be his duty to escape, is in the same position as a fighting soldier. By agreement between sovereign powers, he is not under a duty to escape. Even an invading soldier is not wholly immune. He could be prosecuted in the ordinary courts, if caught, for looting or rape: Oppenheim, International Law, 3rd ed. 1921, vol. 2, pp. 341, 349.

[GILLANDERS J.A.: What about art. 50 of the Convention?] That limits only the liability for an escape; it must be read with art. 51.

As to the penalty, the 1944 amendment (c. 35, s. 1) to s. 365 of The Criminal Code, is applicable to this case: The Interpretation Act, R.S.C. 1927, c. 1, s. 19(2) (*d*), and there is therefore no minimum penalty. The actual crime in this case was not a serious one, and this appeal is brought to determine the principles applicable, rather than to obtain the imposition of a heavy penalty.

G. A. Martin, for the accused, respondent: This liability is treated as doubtful in both Archbold's Criminal Pleading Evidence and Practice, 31st ed. 1943, p. 11, and Russell on Crimes, 8th ed. 1923, vol. 1, p. 106. The true view is that suggested in *Reg. v. Sattler*, *supra*; see also Stephen, History of the Criminal Law, vol. 2, pp. 8-9.

A prisoner of war escaping from a prison camp is in an entirely different position from a convict escaping from a penitentiary. He can be shot at sight by anyone, because, by escaping, he immediately asserts his belligerent character. The "escape" must be considered as a whole, not split up into various periods of time. The magistrate has found as a fact that when the accused removed the parcels from the mail bag he was still trying to find articles that would help in his escape.

As to the Geneva Convention, no treaty can change municipal law, unless it is implemented by legislation. It is of course part of international law, and the municipal law should, where possible, be interpreted in accordance with international law. But the convention does not support the appellant's argument: art. 51 is wholly negative. The words "disciplinary" and "judicial" in art. 52 should not be read as equivalent to "military" and "civil" respectively. "Disciplinary" punishment is imposed by the camp commandant without trial, while "judicial" punishment follows a trial, but the trial may be by a court martial.

It is significant that there is no reported case of the successful prosecution of a prisoner of war for any act done in connection with an attempt to escape.

J. J. Robinette, in reply: It is to be borne in mind that prisoners of war, while in Canada, enjoy the protection of the criminal law; they should therefore be subject to the restraints of that law.

1st March 1945. ROBERTSON C.J.O.:—I have had the privilege of reading the reasons for judgment prepared by Mr. Justice Gillanders, and I concur in the conclusion reached by him.

Any exemption that this prisoner of war may have from the criminal law of Canada can, I think, only be such as may be found in the Convention relative to the Treatment of Prisoners of War, concluded at Geneva, and dated 27th July 1929. While, no doubt, a body of international law, that has made great changes in the position of a prisoner of war, has developed since the time when prisoners of war were put to death, and, as more humane notions prevailed, that practice gave way to that of making slaves of them, and, still later, of putting them to ransom, it is in comparatively recent times that arrangements came to be made between warring nations, for the exchange of prisoners between the states themselves. There does not, however, appear to be any rule of international law, apart from whatever the Conventions between states may provide, whereby prisoners of war are entitled to exemption from the municipal laws of the country where they are held prisoner.

The Convention of 1929, in its articles dealing with prisoners of war, is not silent with respect to judicial proceedings against them, as distinguished from disciplinary punishment administered by the military authorities. It is plain from its express provisions that judicial proceedings are contemplated, such as may be taken against members of the armed forces of the detaining Power who offend. Art. 46 provides as follows:

“Prisoners of war shall not be subjected by the military authorities or the tribunals of the detaining Power to penalties other than those which are prescribed for similar acts by members of the national forces.”

Art. 47 contains the following clause: “In all cases the period during which a prisoner is under arrest (awaiting punishment or trial) shall be deducted from the sentence, whether disciplinary or judicial, provided such deduction is permitted in the case of members of the national forces.”

Art. 53 provides: “Prisoners qualified for repatriation against whom any prosecution for a criminal offence has been brought may be excluded from repatriation until the termination of the proceedings and until fulfilment of their sentence,

if any; prisoners already serving a sentence of imprisonment, may be retained until the expiry of the sentence."

Art. 63 provides: "A sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power."

Art. 64 provides: "Every prisoner of war shall have the right of appeal against any sentence against him in the same manner as persons belonging to the armed forces of the detaining Power."

Art. 75, which deals with the liberation and repatriation of prisoners of war at the end of hostilities, includes this clause: "Prisoners of war who are subject to criminal proceedings for a crime or offence at common law may, however, be detained until the end of the proceedings, and, if need be, until the expiration of the sentence. The same applies to prisoners convicted for a crime or offence at common law."

No doubt, cases will arise where it becomes a question whether the conduct of a prisoner of war is more properly to be regarded as a matter for military discipline, rather than for judicial proceedings as a breach of the criminal law. The question put by Lord Campbell C.J. in *Reg. v. Sattler* (1858), Dears. & B. 525 at 543, 169 E.R. 1111, quoted by my brother Gillanders in his judgment in this case, may serve as an illustration. No such question arises in this case. The "looting" of the mail-bag was not an act necessary for the escape of the prisoner of war. In my opinion it stands upon no different or higher footing than a similar act committed by a member of the armed forces of Canada. The act served no military purpose. It was an offence against the civil power for the personal advantage of the respondent.

In view of the considerations that I have stated, it is, in my opinion, the duty of the Court to deal with the charge against the respondent in the same way as we would deal with a similar charge against a member of the armed forces of Canada. The charge of stealing a parcel sent by parcel-post was proved. His status as a prisoner of war does not exempt him from conviction, and it only remains to fix the penalty. No doubt, there were mitigating circumstances, and it so happens that since this charge was laid, the section of The Criminal Code, R.S.C. 1927,

c. 36, that applies, has been amended, so that we are able to prescribe for this offence a less severe sentence than a term of three years' imprisonment, which was formerly the minimum sentence allowed. I agree with my brother Gillanders that a term of two months' imprisonment is proper in the circumstances of this case.

Supplementing the references to authorities by my brother Gillanders, I refer to Wheaton's *Elements of International Law*, 7th ed. 1944, vol. 2, p. 177 and following pages; an article on *Prisoners of War* in 190 *Law Times* (1940), p. 150, and an article in Vol. 35, *American Journal of International Law* (pp. 519-523), dealing with escaped prisoners of war in a neutral jurisdiction.

HENDERSON J.A.:—I have had the privilege of reading the opinions of my Lord the Chief Justice and of my brother Gillanders, with which I agree.

GILLANDERS J.A.:—The respondent is a German prisoner of war, a paratrooper of the German Air Force, taken prisoner in Holland in 1942, first transported to England and later moved to Canada, where he has since been kept. On 21st December 1943, he secreted himself in a prisoner-of-war mail-bag at the prisoner-of-war camp where he was detained. The mail-bag was in due course placed with others in the mail car on a Canadian National train, its weight exciting comment, but apparently not the suspicion of the railway mail clerks who moved it from place to place. The mail-bag was finally placed close to a radiator in the mail car. Finally the accused, oppressed by heat and lack of fresh air, released himself from the bag by cutting it open with a knife which he had in his possession. After getting out of the bag in which he had concealed himself, he cut open another mail-bag in the car and removed some parcels from it. He broke these parcels open and discovered a quantity of cigarettes, some gum, and a bottle of perfume. He smoked some of the cigarettes and used some of the gum and perfume. He was later apprehended and subsequently charged with theft from the mails. The charge was dismissed by the magistrate before whom he came, and the Crown now appeals to this Court.

Counsel for the Crown necessarily accepts and relies upon the facts found, but submits that the accused as a prisoner of war was, under the circumstances, subject to the complete

restraint of the criminal law, and that he should have been convicted of the offence charged.

Counsel for the respondent submits that what the accused did were in fact acts which were part of or incidental to his escape and that such acts by a prisoner of war, that is those forming part of or incidental to his escape from the detaining Power, should be deemed to be acts of war rather than criminal offences.

There is little definite authority in the decided cases. Counsel for the respondent draws attention to a question put by Lord Campbell C.J. in *Reg. v. Sattler* (1858), Dears. & B. 525 at 543, 169 E.R. 1111 at 1113:

"A prisoner of war committing murder would be triable; but the question is, what constitutes murder? If a prisoner of war who had not given his parole killed a sentinel in endeavouring to effect his escape, would that be murder?"

In discussing exceptions to the general rule that the criminal law applies to all persons who are within certain local limits, Mr. Justice Stephen in his work, "The History of the Criminal Law of England", vol. 2, p. 8, after examining the few authorities then existing which referred to alien enemies and prisoners of war, expresses the view:

"It is difficult to extract any definite proposition from these authorities as to the cases in which foreigners are liable to English criminal law, when they are brought, against their will, into places where that law is, as a general rule, administered. None of them, however, is inconsistent with, and each of them more or less distinctly illustrates, the proposition that protection and allegiance are co-extensive, and that obedience to the law is not exacted in cases in which it is avowedly administered, not for the common benefit of the members of a community of which the alleged offender is for the time being a member, but for the benefit of a community of which he is an avowed and open enemy."

It is material to consider the provisions of the Convention Relative to the Treatment of Prisoners of War, concluded at Geneva on 27th July 1929. His Majesty the King and the President of the German Reich were parties to this convention and it was signed by plenipotentiaries for Canada.

Part III, Section V, Chapter 3, deals with "Penal Sanctions with regard to Prisoners of War". Without attempting to set

out at length all the provisions of this chapter, the following may be observed:

Art. 45 provides:

"Prisoners of war shall be subject to the laws, regulations, and orders in force in the armed forces of the detaining Power.

"Any act of insubordination shall render them liable to the measures prescribed by such laws, regulations, and orders, except as otherwise provided in this Chapter."

Art. 46 provides: "Prisoners of war shall not be subjected by the military authorities or the tribunals of the detaining Power to penalties other than those which are prescribed for similar acts by members of the national forces." And further: "prisoners of war, undergoing disciplinary punishment shall not be subjected to treatment less favourable than that prescribed, as regards the same punishment, for similar ranks in the armed forces of the detaining Power."

Art. 47 provides, *inter alia*: "The judicial proceedings against a prisoner of war shall be conducted as quickly as circumstances will allow." This article later refers to the sentence "whether disciplinary or judicial, provided such deduction is permitted in the case of members of the national forces."

Art. 48 provides in part: "After undergoing the judicial or disciplinary punishment which has been inflicted on them, prisoners of war shall not be treated differently from other prisoners."

Art. 50 provides in part: "Escaped prisoners of war who are re-captured before they have been able to rejoin their own armed forces or to leave the territory occupied by the armed forces which captured them shall be liable only to disciplinary punishment."

Art. 51 provides in part: "Attempted escape, even if it is not a first offence, shall not be considered as an aggravation of the offence in the event of the prisoner of war being brought before the courts for crimes or offences against persons or property committed in the course of such attempt."

Art. 52 provides:

"Belligerents shall ensure that the competent authorities exercise the greatest leniency in considering the question whether an offence committed by a prisoner of war should be punished by disciplinary or by judicial measures.

"This provision shall be observed in particular in appraising facts in connection with escape or attempted escape.

"A prisoner shall not be punished more than once for the same act or on the same charge."

Part 2 of this Chapter makes provisions respecting disciplinary punishments, and part 3 is headed "Judicial Proceedings". This provides rules and requirements relating to judicial hearings of charges against prisoners of war, for notice being given of the name and rank of the prisoner, the place of detention, and statement of the charges, to the protecting Power; that no prisoner should be sentenced without an opportunity to defend himself; that no prisoner should be compelled to admit his guilt, and he has a right to a qualified advocate of his own choice, and if necessary, to a competent interpreter, and various other provisions aimed at safeguarding the rights of a prisoner of war in judicial proceedings.

It is quite apparent that the Convention anticipates judicial proceedings against prisoners of war, as well as disciplinary proceedings by military authorities.

In view of the provisions of art. 45, it is of interest to keep in mind to what extent our own armed forces which in this case are those of the detaining Power, are subject to proceedings in the courts. The question may be answered in the words of Sir Lyman Duff, Chief Justice of Canada, in *Re Exemption of Members of the Military or Naval Forces of the United States of America from Criminal Proceedings in Canadian Courts*, [1943] S.C.R. 483 at 490, 80 C.C.C. 161, [1943] 4 D.L.R. 11.

"My view can be stated very briefly. It is, I have no doubt, a fundamental constitutional principle, which is the law in all the provinces of Canada, that the soldiers of the army of all ranks are not, by reason of their military character, exempt from the criminal jurisdiction of the civil (that is to say, non-military) courts of this country."

In amplification of this view, the Chief Justice continues, later:

"That is a well-settled principle which has always been jealously guarded and maintained by the British people as one of the essential foundations of their constitutional liberties. I quote two passages on the subject—the first is from Dicey's 'Law of the Constitution', and the second is from Dr. Goodhart,

the distinguished lawyer who is the successor of Maine and Pollock in the chair of jurisprudence at Oxford University and is the editor of the *Law Quarterly Review*; this passage is taken from an article written by Dr. Goodhart for the *American Bar Association Review* for the information of American lawyers. At page 300 of Dicey it is stated:

“‘A soldier’s position as a citizen—The fixed doctrine of English law is that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen. “Nothing in this Act contained” (so runs the first Mutiny Act) “shall extend or be construed to exempt any officer or soldier whatsoever from the ordinary process of law.” These words contain the clue to all our legislation with regard to the standing army whilst employed in the United Kingdom. A soldier by his contract of enlistment undertakes many obligations in addition to the duties incumbent upon a civilian. But he does not escape from any of the duties of an ordinary British subject.

“‘The results of this principle are traceable throughout the Mutiny Acts.

“‘A soldier is subject to the same criminal liability as a civilian. He may when in the British dominions be put on trial before any competent “civil” (i.e. non-military) court for any offence for which he would be triable if he were not subject to military law, and there are certain offences, such as murder, for which he must in general be tried by a civil tribunal. Thus, if a soldier murders a companion or robs a traveller whilst quartered in England or in Van Diemen’s Land, his military character will not save him from standing in the dock on the charge of murder or theft.’

“Referring to the legislation introduced in 1942 and passed by the Parliament of the United Kingdom, Dr. Goodhart says:—

“‘The important constitutional principle which was involved is one of the essential ones on which the English constitution is based. It is described by Dicey as “the fixed doctrine of English law that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen.” It is part—and perhaps the most important part—of “the rule of law” which is the distinctive feature of the British system. “It becomes, too, more and more apparent that the

means by which the courts have maintained the law of the constitution have been the strict insistence upon the two principles, first of 'equality before the law', which negatives exemption from the liabilities of ordinary citizens or from the jurisdiction of the ordinary courts, and, secondly, of 'personal responsibility of wrong-doers', which excludes the notion that any breach of law on the part of a subordinate can be justified by the orders of his superiors. This means that the British soldier is subject to the jurisdiction of the ordinary courts, and is responsible to them for any breaches of the law which he may commit. So long as this principle is maintained, it will be impossible for anyone to establish a military dictatorship in Great Britain".'

There is nothing in the provisions of the Convention to exclude the application of The Criminal Code here.

Counsel for the appellant urges that prisoners of war are subject to the complete restraint of the criminal law, whether or not the acts in question are a part of or incidental to escape from the detaining Power. It is unnecessary and undesirable to express here an opinion as to what view should be taken under other circumstances, for instance, if a prisoner of war were accused of assaulting a military guard who endeavoured to prevent his escape.

In this case the magistrate has found as a fact:

"With regard to the perfume, I have given him the benefit of the doubt and say that he used it in order to assist his escape by concealing the extreme odour of perspiration. With regard to the cigarettes and gum I am unable to see that they would assist his escape materially and I feel that he took them for his own comfort."

I see no reason to disagree with the finding of fact that the taking of the cigarettes and gum from the mail-bags was for the personal comfort of the accused and not a part of or incidental to his escape. Under the circumstances he is liable to the restraint of the criminal law and to proceedings in the courts in the same way as a member of the armed forces of this country.

The appeal must be allowed and a conviction recorded.

As to sentence—the provisions of the Code with respect to such a charge have been recently amended so that now the

minimum sentence is in the discretion of the Court. Counsel for the Crown suggests only a moderate sentence. Under the circumstances a sentence of two months should be imposed.

Appeal allowed.

Solicitor for the Crown, appellant: J. J. Robinette, Toronto.

Solicitor for the accused, respondent: G. A. Martin, Toronto.

[McRUER J.A.]

Bell v. Bell and Colquhoun.

Evidence—Proof of Military Service—Admissibility of Certified Copy of Army Records—Attestation Paper—The Evidence Act, R.S.O. 1937, c. 119, s. 28.

Divorce—Evidence—Proof of Military Service.

A soldier's attestation papers, kept in accordance with the provisions of the King's Regulations and Orders, are public records, and are admissible in evidence if produced by the officer to whose custody they are entrusted. *Rex v. Fitzgerald and Lee* (1741), 1 Leach 20; *Rex v. Rhodes* (1742), 1 Leach 24; *Wallace v. Cook* (1804), 5 Esp. 117, applied. This being so, it follows that a copy, certified to be a true copy by the officer to whose custody the original has been entrusted, is admissible under s. 28 of the Ontario Evidence Act, and constitutes *prima facie* evidence of the facts there recorded.

AN ACTION by a wife for divorce.

15th February 1945. The action was tried by McRUER J.A. without a jury at Ottawa.

S. A. V. Martin, for plaintiff.

No one for the defendants.

2nd March 1945. McRUER J.A.:—This action is brought for an order dissolving the marriage between the plaintiff and the defendant Bell, which was entered into on the 6th July 1940, at the city of Ottawa. The defendant Bell enlisted in the Canadian army on the 21st January 1941, and is said to have proceeded overseas on the 19th June 1941. The only question that requires particular consideration in this case is the admissibility of a certified copy of the attestation paper, "M.F.M.2", which is tendered in proof of the fact that the defendant has been absent from Canada since the 19th June 1941.

The admissibility of a record of this character has been dealt with in our courts in *Hare v. Hare*, [1943] O.W.N. 324, [1943] 3 D.L.R. 579, and in *Stafford v. Stafford and Cope*,

[1945] O.W.N. 52, [1945] 1 D.L.R. 263, with the result that there is some difference of judicial opinion.

In *Hare v. Hare*, the District Records Officer of Military District No. 2, was called to prove that the appellant had proceeded overseas on 13th August 1940, and that he had not returned until the date of the trial. This evidence was rejected by the learned trial judge, as the Records Officer merely gave evidence as to what appeared in the records. On appeal, the judgment of the learned trial judge was reversed and the record was accepted as proof of the facts, relying on s. 69 of The Militia Act, R.S.C. 1927, c. 132, which makes applicable the provisions of the Imperial Army Act. Clauses (g) and (h) of s. 163 of The Army Act, 1881, 44-45 Vict. c. 58, which is re-enacted from year to year, are as follows: "(g) Where a record is made in one of the regimental books in pursuance of any Act or of the King's regulations, or otherwise in pursuance of military duty, and purports to be signed by the commanding officer or by the officer whose duty it is to make such record, such record shall be evidence of the facts thereby stated:" "(h) A copy of any record in one of the said regimental books purporting to be certified to be a true copy by the officer having the custody of such book shall be evidence of such record".

After pointing out that under Order in Council 4698, passed 3rd June 1942, Part II Orders are regimental books, Kellock J.A. indicated that the appellant ought to have tendered the evidence in the form of a certified copy pursuant to the provisions of The Army Act.

In *Stafford v. Stafford and Cope*, [1945] O.W.N. 52, [1945] 1 D.L.R. 263, Urquhart J. declined to follow the judgment of the Court of Appeal in *Hare v. Hare* and pointed out that the scope of clauses (g) and (h) of s. 163 of The Army Act were limited by the opening words of the section, viz.: "The following enactments shall be made *with respect to evidence in proceedings under this Act*, whether before a civil court or a court-martial". (The italics are mine.)

Sitting as I do as a trial judge, I feel that I am bound by the decision in *Hare v. Hare*. There are, however, in my view, sound reasons for holding that the evidence tendered in the case at bar is admissible independently of those set out by Kellock J.A. in *Hare v. Hare*. If I were in disagreement with the result in *Hare v. Hare*, I would refer the case to the Court

of Appeal under the provisions of s. 31 of The Judicature Act, R.S.O. 1937, c. 100, but in view of the fact that I arrive at the same conclusion it is not necessary to act under this section.

The matter for decision divides itself into two parts: (a) Is the evidence tendered admissible if proved by calling the particular officer having charge of the records? (b) May a certified copy of the attestation paper be accepted in lieu of calling the officer in charge of the records?

In order to answer these questions it is necessary to examine the law governing the records that are kept. The King's regulations which have the force of law in Canada provide that the service of each soldier must be recorded on his original and duplicate attestation papers. The original and duplicate must be filed in portfolios in numerical order and properly indexed. The officer in charge of records must be furnished with information for keeping these records. This information is furnished in Part II Orders (K.R. & O. Can. 1506). Part II Orders deal with matters affecting a soldier's pay, service or documents. Part II Orders are framed in the identical words in which the entry is to be made in the duplicate and original attestation papers. Every circumstance which affects a soldier's service or pay must be published in Part II Orders immediately after its occurrence. Part II Orders are required to be sent to the officer in charge of records (K.R. & O. Can. 1494). A record office must be established at headquarters of each military district (K.R. & O. Can. 1499).

The conditions under which entries are made in a public record are of prime importance in considering the application of the common law and the statute law governing their admissibility as evidence and proof of the facts stated therein. The underlying principle to be applied is set out in Buller's Trials at Nisi Prius, 7th ed. 1817, p. 249a. In referring to an inventory taken by the sheriff as being receivable in evidence between strangers to prove the quantity and value of the goods, it is stated, "for the law intrusting him with the execution must trust him throughout." The law, not only trusting the proper officers to make correct entries in Part II Orders and the attestation papers, requires them to do so with disciplinary sanctions. Under the common law such entries, when properly proved, are evidence of the facts stated.

Wigmore on Evidence, 3rd ed. 1940, s. 1641, states: "In the Navy and the Army are kept certain *muster-books* and other records as a necessary part of administration; these have always been regarded as admissible to prove the facts customarily there recorded. Moreover, by statute in many jurisdictions, records of enlistment, muster, discharge, death, and the like, are required to be kept by local officers who would not ordinarily have these duties, such records being made up by compilation from the original records of the officers within the service. The objection to these, namely, that they are not based on personal knowledge, is overcome by the circumstance that this duty is expressly created by statute; this objection, moreover, has never availed even against books, kept by custom and necessity, in the central administrative offices of Army and Navy."

In support of this statement of the law the learned author relies on English and American cases. Consideration may be confined to the English cases.

In *Rex v. Fitzgerald and Lee* (1741), 1 Leach 20, 168 E.R. 113, the accused were charged with forging the last will and testament of one Peter Perry, an able seaman on board His Majesty's Ship "Lancaster". It was proved by the muster-book, transmitted by the officers of the ship to the Navy Office, which was produced by the clerk of the tickets from the Navy Office, that Peter Perry belonged to the ship "Lancaster", that there was £42.16 due to him on his death, and that a ticket was made out for payment and delivered to the person who brought the will. The accused were found guilty. The question was reserved to the judges "Whether the muster-book was admissible evidence". The judges assembled to consider the question, but their opinion was not publicly given. The prisoners were executed in due course.

In *Rex v. Rhodes* (1742), 1 Leach 24, 168 E.R. 115, the accused was charged with forging the last will and testament of one John Thompson, a seaman late on board His Majesty's Ship "Flamborough". The clerk of the ticket office in the navy-yard gave evidence that it was customary for the captain of a man-of-war to transmit accounts of the crews to the Navy Office as frequently as possible and that these accounts were entered regularly in muster-books containing the names of all those who were living and dead. The muster-book of the "Flamborough" was produced and there was an entry that "John

Thompson, an able seaman, died 22 August 1739". The prisoner's counsel contended that it was incumbent upon the Crown to prove by the best evidence that the nature of the fact would permit that the testator was dead and that the best evidence would be evidence by one of the crew and not by the accounts of the captain or other officers who might by accident or design return a man dead who was really alive. Counsel for the Crown replied that it was the constant course and uninterrupted practice of the Court to admit the entry contained in the muster-book. Relying on *Rex v. Fitzgerald and Lee, supra*, the evidence was admitted.

In *Wallace v. Cook* (1804), 5 Esp. 117, 170 E.R. 757, the evidence of a clerk called from the Sick and Hurt Office was accepted to prove the death of one who had entered service on a King's ship. The book was a copy from the different returns made by officers of the ship of the persons dying on board. Returns were made from the book to the Inspector of Wills. Lord Ellenborough said it was clear evidence. "It was a book of office, kept by a public officer under the Admiralty; and to which credit was given, by the inspectors receiving it as evidence of the death of the sailors mentioned to be dead in the different returns."

Wallace v. Cook, supra, was quoted and followed in *Gleen v. Gleen* (1900), 17 T.L.R. 62, where entries on an army medical form, to the effect that the respondent was suffering from a certain disease, were received as evidence of adultery.

The principles followed in the foregoing cases are applicable to the entries made in the attestation papers M.F.M.2. Not only do these constitute a record of the soldier's service, made by those who are under a legal obligation to keep a correct record, but Part II Orders are, under the provisions of P.C. 4698/1942, deemed to be regimental books. Even if there were no such provision I would hold that Form M.F.M.2, kept as it is required to be kept, filed numerically and indexed, would be a record to which the above principles would be applicable. In each case where records of this character are tendered in evidence, the facts of the case must determine the admissibility of the evidence, and not the name by which the record may be called.

It remains to be considered whether a copy of the record, certified to be correct by the officer in charge of records, is admissible. The common law, although recognizing the prac-

tical necessity for receiving, as proof of the facts, the entries contained in records of this public nature, has not implied an authority in the person in whose charge they are to certify copies.

Very early in the history of the United States of America the Federal Supreme Court declined to follow the common law and adopted the principle that if a document would be receivable in evidence merely by the production of the original by the officer in whose charge it was kept, a copy should be received if certified to be a true copy by that officer. *Church v. Hubbard* (1804), 2 Cranch 187 at 236; *The United States v. Percheman* (1833), 7 Peters 51 at 86, following in *Lembeck v. United States Shipping Board Emergency Fleet Corporation* (1925), 9 Fed. (2d) 558. An authority to certify copies was implied in a public officer entrusted with keeping the records.

In Ontario the admissibility of a certified copy is dependent on the statute law. Section 28(1) of The Evidence Act, R.S.O. 1937, c. 119, provides as follows: "Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, a copy thereof or extract therefrom shall be admissible in evidence if it is proved that it is an examined copy or extract, *or that it purports to be signed and certified* as a true copy or extract by the officer to whose custody the original has been entrusted." (The italics are mine.)

This provision is remedial and should receive a beneficial construction in that it tends to facilitate the proof of certain matters that could only be proved with some difficulty under the common law.

I am of the opinion that the attestation paper M.F.M.2, with the entries thereon, having been kept by the proper officers pursuant to the duties imposed upon them under the King's Regulations and Orders, is a document "of so public a nature as to be admissible in evidence on its mere production from the proper custody," and that the entries thereon constitute *prima facie* proof of the facts shown therein. That being so, a copy that "purports to be signed and certified as a true copy . . . by the officer to whose custody the original has been entrusted" is properly receivable as *prima facie* evidence of the facts entered therein.

Judgment will go for a decree *nisi*, together with costs against the male defendant.

Judgment accordingly.

Solicitors for the plaintiff: May & Martin, Ottawa.

[COURT OF APPEAL.]

Re Westwood Addition, Hamilton.

Real Property — Registration of Plan of Subdivision — When Plan becomes Binding—Title to Road Allowances Shown thereon—Power to Amend or Alter Plan—Closing of Road Allowances—Jurisdiction of County Court—The Registry Act, R.S.O. 1937, c. 170, s. 88—The Surveys Act, R.S.O. 1937, c. 232, s. 12—The Municipal Act, R.S.O. 1937, c. 266, ss. 453-455—The Planning and Development Act, R.S.O. 1937, c. 270, s. 12.

The effect of s. 12 of The Surveys Act, read with ss. 453 to 455 of The Municipal Act, is that as soon as a plan of subdivision becomes binding upon the owner of the lands subdivided (*i.e.*, as soon as a sale is made under the plan), the municipality is to be deemed to be the owner of the allowances for roads and streets laid down in the plan. But, until these allowances have been assumed by the municipality for public use, a County Judge has jurisdiction, on an application to amend or alter the plan under s. 88 of The Registry Act, to close such street allowances, and a municipal by-law or the consent of the municipality is not essential.

Although subs. 3 of s. 88 of The Registry Act gives a right of appeal only from "any such order", and subs. 1 refers only to an order authorizing or ordering amendments or alterations of a plan, there is also a right of appeal from an order dismissing an application, under subs. 1, to amend or alter.

AN APPEAL from the judgment of Lazier Co. Ct. J., of the County Court of the County of Wentworth, dismissing an application, under s. 88 of The Registry Act, R.S.O. 1937, c. 170, to amend or alter a plan of subdivision.

14th February 1945. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and ROACH JJ.A.

C. W. R. Bowlby, K.C., for the appellants: The trial judge found that the streets shown on the plan, other than Stroud Road, had become highways within the meaning of s. 12 of The Planning and Development Act, R.S.O. 1937, c. 270. This section has nothing whatever to do with the case at bar. The section states that no highway shall be closed in an urban zone without the consent of the municipality. None of the lands subdivided here are within any urban zone or joint urban zone, as defined by s. 1 of the statute. These lands are entirely within the city. [ROBERTSON C.J.O.: Does that mean that the city itself is not part of an urban zone?] A zone surrounds the city, as s. 2

sets out. The Registry Act, R.S.O. 1937, c. 170, s. 88 empowers a judge of the Supreme Court to make an order amending or altering a plan. The purpose of s. 88 is to prevent applicants closing up streets to the prejudice of people who have bought lots; it does not seem to me that the City of Hamilton has any status in this matter. [ROBERTSON C.J.O.: Of what importance is subs. 2 of s. 12 of The Surveys Act, R.S.O. 1937, c. 232?] That section is restricted by s. 88 of The Registry Act, which permits the learned judge to make an order amending or altering the plan, and it is not necessary to obtain the consent of the respondent to the making of such an order.

G. A. Gale, for the respondent: No appeal lies in this case. Section 88(1) of The Registry Act, permits a judge of the Supreme Court or County Court to make an order amending or altering the plan; statutory jurisdiction is given to the judge. The words "any such order" in subs. 3 can only have reference to an order amending or altering the plan. If an application is made and a plan is amended there is much more reason for permitting an appeal from that order. In this case, the owner put on the plan and is now seeking to cancel it. If the plan is amended then there should be a right of appeal. The only order contemplated under subs. 1 is an order amending or altering: *Re Hynes and Swartz*, [1937] O.R. 924 at 931, [1938] 1 D.L.R. 29. No appeal lies having regard to the form of the order.

We cannot support the ground on which the trial judge based his decision and we must admit that s. 12 of The Planning and Development Act is not applicable here because none of the lands subdivided, as shown on the plan in question, are within any urban zone, or joint urban zone; but nevertheless, the order of the trial judge is correct and the appeal should be dismissed.

The appellant states that if this land was without the city of Hamilton he would need our consent, but because it is within the city he does not require it. The City of Hamilton must have the right to object to amendment of the plan, either under s. 12, *supra*, or because the lands in the highway vested in the City. Where the land is vested in the City, s. 88 of The Registry Act, is not applicable, nor does it give the right to close the street without the consent of the City. With reference to the proposition that the land shown in the road allowance is vested

in the City and has become a public highway, s. 12(2) of The Surveys Act, R.S.O. 1937, c. 232, must be considered. In this case, on the plan itself there is the certificate of the owners; there we have those road allowances laid out on the plan and those streets became public highways. The fundamental defect in the appellant's argument is that the forerunner of subs. 2 of s. 12 of The Surveys Act does not conform with the present wording. Section 12(4) of The Surveys Act deals only with the effect of the closing of the highway and does not purport to limit or extend the provisions of subs. 2, which lays down what are public highways. The Municipal Act, R.S.O. 1937, c. 266 vests lands in the municipality as a public highway. The land in the road allowance is vested in the municipality if the plan is altered and the road closed. Then, if the roads have been assumed for use, there is no reversion; if on the other hand there is no assumption for public use, then the land returns to the owners of lands adjoining the road allowance, but there must be a conveyance by the City. [GILLANDERS J.A.: Assuming all that, has the City the right to object to the amendment of the plan?] It would amount to expropriation of their land once it becomes used as a highway. [ROBERTSON C.J.O.: What of s. 88 of The Registry Act? You say that upon registration of the plan the streets become vested in the municipality, yet the very Act that provides for its registration says that the plan shall not be binding.] If the land is vested in the municipality, then it cannot be regained without the consent of the municipality. [ROBERTSON C.J.O.: How is the plan not going to be binding upon a man if his property vested in the municipality upon registration?] The Municipal Act, R.S.O. 1937, c. 266, s. 454. We come within the second category in s. 453, "highways laid out or established under the authority of any statute", *i.e.*, The Registry Act. [ROBERTSON C.J.O.: No; that only provides for registration, not for laying out highways.] Section 83 of The Registry Act so provides. Section 453 of The Municipal Act speaks of dedication by the owner. Subs. 9 of s. 12 of The Surveys Act requires the corporation to convey if none of the lots is sold. [GILLANDERS J.A. Does the act of dedication not require something by the owners?] The owners do not purport to convey the road allowances, they convey the lots. They convey the fee simple in lots, not in road allowances. If land is vested in the City, it cannot be divested by alteration of the plan under s. 88 of The Registry Act; s. 88 is no longer applicable and it

becomes necessary to pass a municipal by-law for that purpose. Section 88 was never intended to give a power of virtual expropriation to a judge by alteration of the plan. What is being sought here by the appellant is an order cancelling the plan, which is not within the scope of s. 88, which gives a right only to alter or amend the plan. Section 89 provides for cancellation of the plan. It was never intended that a street could be closed against the owners' wish. This street cannot be closed without the consent of the City. Once it has become a public highway, it is beyond the judge's jurisdiction to close it.

C. W. R. Bowlby, K.C., in reply: Dedication within the meaning of The Municipal Act means an offer to dedicate, nothing else: 5 C.E.D. (Ont.), p. 491. The offer can be accepted in two ways, as in *Re City of Toronto Plan M. 188* (1913), 28 O.L.R. 41, 11 D.L.R. 424, or by opening up a road for use as a public highway. The trial judge would have granted the application if he had not thought that s. 12 of The Planning and Development Act was applicable.

Cur. adv. vult.

9th March 1945. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the order of Judge Lazier, of the County Court of the County of Wentworth, made on the 18th September 1944, dismissing an application to amend or alter a plan of subdivision of part of the Gore of Ancaster, now in the city of Hamilton, known as the Westwood Addition, and registered as Plan No. 721.

The plan was registered in the Registry Office on the 30th day of October 1941, by Gorban Land Company Limited, the owner of the lands subdivided. According to the plan the lands included in it are subdivided into lots numbered from 123 to 244, and one larger area shown as Parcel "A". There are also streets shown in the subdivision, and there is also, in the subdivision, a strip of land 25 feet wide that extends the full length of the westerly side of the subdivision where the subdivision is bounded by a street or lane already existing, and shown on the plan as Stroud Road. This strip, added to the existing street or lane, as appears to be the intention, gives Stroud Road the full width of 66 feet, and it has been adopted by the municipality for public use.

By deed dated 1st August 1942, the Gorban Land Company Limited conveyed to the present applicants, Ryland H. New and Fannie Irene Hamilton, all lots, numbers 123 to 244, both inclusive, and Parcel "A", as shown on the plan, together with such rights as the grantor then had in the streets shown on the plan, namely, Haddon Avenue, Gary Avenue, Dalewood Avenue and Baxter Street. To put it more simply, the deed conveyed all the lots in the subdivision and Parcel "A", and the rights of the grantors in all the streets shown on the plan, except the strip of land 25 feet wide that adjoined Stroud Road and became part of it. There has been no sale, other than this, of any of the lots shown on the plan, or of Parcel "A", and there is no encumbrance upon any of them. Neither have any of the streets, other than Stroud Road, been opened up or in any way adopted for public use by the municipality.

The application to alter or amend the plan was made under s. 88 of The Registry Act, R.S.O. 1937, c. 170, and it was opposed by the Corporation of the City of Hamilton. The applicants asked that the whole plan be cancelled except that part forming part of Stroud Road. The learned County Judge dismissed the application, on the ground that, as he considered, s. 12 of The Planning and Development Act, R.S.O. 1937, c. 270, prevented him from making an order stopping up or closing the highways shown on the plan, except with the approval of the council of the City of Hamilton. Section 12 of The Planning and Development Act deals only with highways "in any urban zone or joint urban zone." It is conceded by counsel for the respondent that none of the lands subdivided, as shown on the plan in question, are within any urban zone or joint urban zone, as defined by the statute, and that the order cannot be supported upon the ground upon which the learned County Judge proceeded. He opposes the appeal, however, upon other grounds.

In the first place, objection is taken that no appeal lies from an order that simply dismisses an application to alter or amend a plan under s. 88 of The Registry Act. Subs. 1 of s. 88 provides that amendments or alterations of a plan may be authorized or ordered to be made by a judge of the Supreme Court or by a judge of the County or District Court of the county or district in which the land lies, on application for the purpose. Subs. 3 of s. 88 says that "An appeal shall lie from any such order

to the Court of Appeal." It is argued that the only order from which an appeal will lie is such an order as subs. 1 says the judge may make, that is, an order that amends or alters the plan. In my opinion this is too narrow a view to take of subs. 3. The respondent does not question the power of the judge, in a proper case, to make an order, in the exercise of the jurisdiction given to him by s. 88, dismissing an application made to him under subs. 1, although subs. 1 does not expressly say that he may do so. Neither can subs. 3 be read with the absolute literalness that respondent's counsel contends for. The words "such order" do not relate back to some order previously mentioned, for the word "order", as a noun, does not appear elsewhere in the section. I think subs. 3 may properly be read, and should be read, as giving a right of appeal from such order as the judge may make in finally disposing of the application made to him under subs. 1, including an order that simply dismisses the application. I have not been able to find any case where the point has been decided, but, in my opinion, effect cannot be given to this preliminary objection.

An objection of more substance taken for the respondent is that the lands shown on the plan as avenues or streets, are existing highways, and are vested in the municipality, and that, as such, they cannot be closed except by the municipality, or with its consent, and are not subject to an order under s. 88 of The Registry Act. Reference is made to subs. 2 of s. 12 of The Surveys Act, R.S.O. 1937, c. 232, which is as follows:—

"(2) Subject to the provisions of *The Registry Act* and *The Land Titles Act*, as to the amendment or alteration of plans, all allowances for roads, streets, lanes or commons, surveyed in any such city, town, village, lot, mining claim, mining location or any parcel or tract of land or any part thereof, which has been or may be surveyed and laid out by companies or individuals, and laid down on the plans thereof shall be public highways, streets, lanes and commons."

Reference is also made to ss. 453, 454 and 455 of The Municipal Act, R.S.O. 1937, c. 266. It is argued that the registration of the plan is a dedication by the owner of the streets shown upon it, and it is pointed out that the registered plan bears the following, signed by the owner, "Lots 123 to 244, Parcel (A) and the streets as outlined in Red on this plan are laid out

according to our instructions, and the said streets are hereby dedicated as Public Highways." Also upon the registered plan, and signed by the mayor and clerk of the municipality, is the following, "The Municipal Council of the City of Hamilton do hereby approve of the registration of this plan." The contention is, that by force of the statutes referred to, and even without any act of acceptance by the municipality, the avenues and streets in question became public highways, the soil and freehold of which was vested in the Corporation of the City of Hamilton, which was also given jurisdiction over them. Further, it is pointed out that The Municipal Act clearly recognizes this as the effect of the statutory provisions already referred to, for s. 480, which imposes liability on a municipality to keep its highways in repair, provides, in subs. 6, as follows:

"(6) This section shall not apply to a road, street or highway laid out or to a bridge built by a private person or by a body corporate until it is established by by-law of the council or otherwise assumed for public use by the corporation."

There was formerly a good deal of judicial controversy as to the effect proper to be given to the several statutory provisions then in force in relation to the character and ownership of land laid out as highways by private persons and companies on registered plans of subdivision, and in regard to the jurisdiction to close them, where they had not been adopted for public use by the municipality in which they lie. The cases of *Roche v. Ryan* (1892), 22 O.R. 107, and *Jones v. Township of Tuckersmith* (1915), 33 O.L.R. 634, 23 D.L.R. 569, reversed 45 O.L.R. 67, 47 D.L.R. 684, will serve to indicate the nature of the questions that arose. The provisions of The Registry Act, The Surveys Act and The Municipal Act—all dealing, in some manner, with the same subject-matter—make a complex situation, and the inconsistent decisions upon them resulted in a good deal of confusion. There have been important amendments in the legislation since the cases that I have referred to were decided, more particularly in The Surveys Act and in The Municipal Act. Some matters that were formerly obscure have now, I think, been cleared up. (See The Surveys Act, 1920, 10-11 Geo. V, c. 48.)

It is not necessary, for the purposes of the present case, to determine where the ownership of the allowances for roads

shown on such a plan as we have here lies, after registration of the plan but before any sale is made according to the plan. Section 88 (1) of The Registry Act says that a plan, although registered, shall not be binding upon the person registering the same, or upon any other persons, unless a sale has been made according to such plan, and it may well be that until such a sale is made the allowances for roads shown on the plan remain vested in the owner by whom the plan was registered. There has been here, however, a sale according to the plan. Reference to the plan is absolutely necessary to see what was sold to the applicants, and what was not sold to them. This plan must, therefore, I think be considered to be a plan that became binding on the owner and upon the applicants, when the sale was made to the applicants, but subject to whatever amendments or alterations a judge might make, upon application to him. This is, I think, the result, by virtue of subs. 1 of s. 88 of The Registry Act.

I have already quoted subs. 2 of s. 12 of The Surveys Act. Subs. 4 of that section is as follows:

“(4) Where under subsection 2 an allowance for a road, street or lane laid down upon a plan is a public highway but the municipal corporation has not assumed it for public use, and the allowance or any part thereof is closed by an alteration of the plan under The Registry Act, The Land Titles Act or other provisions in that behalf, the allowance, or part thereof so closed shall belong to the owners of the land abutting thereon.” Succeeding subsections make provision for dividing the road allowance among the different owners, where there are several parcels of land abutting on the allowance for road that is closed. Subs. 9 makes it the duty of the municipality in which the allowance for road was vested to execute a conveyance to each owner of that portion of the road allowance which belongs to him under this section, and the corporation is required to register such conveyance in the proper registry or land titles office. Subs. 10 provides that the cost of preparing and registering the conveyance shall be borne by the municipal corporation.

Reading these provisions of The Surveys Act along with the provisions of The Municipal Act (see ss. 453, 454 and 455), it is, in my opinion, their plain effect that the municipality is to be deemed the owner of allowances for roads and streets laid

down on the plan of a subdivision, such as we have here to deal with, whenever the plan has become binding upon the owner, and this regardless of the fact that the municipality may not have assumed the road or street for public use. The fact that the municipality is required to make a conveyance to the abutting owners when a road or street, or part of a road or street, has been closed by the alteration of the plan under The Registry Act or The Land Titles Act, is consistent only with that interpretation of the several statutory provisions that deal with the matter.

It was contended for the respondent that once a road or street has become vested in the municipality, the provisions of s. 88 of The Registry Act no longer apply, and that a road or street can be closed or altered in such case only by municipal by-law. It is to be noted, however, that the declaration made by subs. 2 of s. 12 of The Surveys Act is "Subject to the provisions of *The Registry Act* and *The Land Titles Act*", while s. 453 of The Municipal Act begins with the words, "Except in so far as they have been stopped up according to law." The difference in the wording of the exception in the two cases is to be accounted for by the fact that s. 453 of The Municipal Act deals with several classes of allowances for roads and highways, as well as with such as are dedicated by the owners of land to public use. Subs. 4 of s. 12 of The Surveys Act is also to be noted in this connection.

It may be—and upon this it is not necessary to express an opinion—that when a highway has been adopted by the municipality for public use, so that the municipality has become liable for keeping it in repair, the jurisdiction to close or alter it is vested solely in the municipality. Mr. Justice Street intimated an opinion of that kind in *Roche v. Ryan, supra*, at the foot of p. 110. We have not to deal with that situation here. In my opinion, the plan in question became binding upon the owners and upon the applicants: the allowances for roads and streets shown upon the plan became vested in the municipality, but (except as to the strip adjoining Stroud Road) were not assumed by the municipality for public use: the County Judge had jurisdiction under s. 88 of The Registry Act to make an order amending or altering the plan, as the applicants asked, and the consent

of the municipality was not essential to the making of such an order.

There are no other persons interested in the lands shown upon the plan, other than the strip adjoining Stroud Road, and no order is asked in regard to that strip. Counsel for the municipality has asked, however, that in case we should be of the opinion that the County Judge has jurisdiction to entertain the application, the matter should be remitted to him, and in view of the fact that he disposed of the application upon a ground that did not involve consideration of the merits of the application, or of any objections the municipality may have to it, it is proper that we should simply set aside the County Judge's order dismissing the application, and send the matter back to him to be dealt with on its merits. We, therefore, allow the appeal and set aside the order of the County Judge, and remit the matter to him. The appellants are entitled to their costs of this appeal.

Appeal allowed with costs.

Solicitors for the applicants, appellants: F. Kent Hamilton, Hamilton.

Solicitor for the City of Hamilton, respondent: A. J. Polson, Hamilton.

[COURT OF APPEAL.]

Re George Coles Limited.

Bankruptcy—Available Act of Bankruptcy—Failure to Meet Liabilities Generally—Date of Failure—Arrangement under The Companies' Creditors Arrangement Act, 1933 (Dom.), c. 36 — Default in Periodical Payments—The Bankruptcy Act, R.S.C. 1927, c. 11, ss. 3 (j), 4(3)(b).

A company entered into an arrangement under The Companies' Creditors Arrangement Act, 1933, which was sanctioned by the Court in 1942, and which provided for periodical payments to the creditors of the company. Default was made in payments falling due at the end of 1942, 1943 and 1944. On 8th December 1944 a letter was written on behalf of the company, pointing out that "there are no free assets available for any payment to the unsecured creditors", stating that a fund had been established "to assist the re-establishing of the business", and offering a further payment of 10 per cent. in full satisfaction of all claims of unsecured creditors. A petition in bankruptcy was launched in January 1945, by creditors all of whom had been parties to the arrangement of 1942.

Held, the receiving order should be made. Each act of default constituted a separate failure to meet liabilities as they became due, within the meaning of s. 3(j) of The Bankruptcy Act, and, although a petition might have been based upon either the 1942 or the 1943 default, the present one was within six months of the default on 31st December 1944, as required by s. 4(3)(b). *Re Canadian Cap Co. Limited* (1924), 53 O.L.R. 506, referred to; *Brown v. Kelly Douglas & Co. Ltd.*; *In re England & Son* (1923), 32 B.C.R. 143, distinguished. Even if this were not so, the letter of 8th December 1944 was a clear admission of inability to pay, and as such constituted an available act of bankruptcy. *Re Raitblat* (1925), 28 O.W.N. 237, 292, followed.

A PETITION for a receiving order.

30th January 1945. The petition was heard by URQUHART J., sitting as Judge in Bankruptcy, at Toronto.

Russell Whitely, for petitioning creditor.

C. A. Thompson, for the debtor company.

D. L. McCarthy, K.C., for Ida Coles.

John Callahan, K.C., for Mary E. Coles estate.

5th February 1945. URQUHART J.:—Petition for a receiving order launched the 9th day of January 1945, and heard on 30th January, by four substantial creditors of the debtor company having claims aggregating about \$4,000. The company not only disputes the petition but has also made a motion to stay proceedings in order that the provisions of The Companies' Creditors Arrangement Act, 23-24 Geo. V., 1933 (Dom.), c. 36, may be invoked.

After some thought I decided to hear the bankruptcy proceedings, but in the course of the hearing what could be said in favour of a stay was advanced by those interested in having the bankruptcy proceedings dismissed. In view of the history

of proceedings herein and the failure of the company to live up to arrangements with its creditors in the past, it would seem unfair to the applicant creditors, whose debts are long-standing, to have their remedies further delayed if they wish to press the application for a receiving order.

The question resolves itself into a neat point of law. The petition is launched under s. 3(j) of The Bankruptcy Act, R.S.C. 1927, c. 11, which reads:

"If he ceases to meet his liabilities generally as they become due."

The alleged ceasing to meet arises from the neglect and failure to carry out the scheme of arrangement between the debtor and its unsecured creditors, adopted and confirmed by order of the Court on 10th April 1942, and in particular by its neglect or failure to pay, on or before 31st December 1944, an amount equal to 25 per cent. of sums due to its unsecured creditors, together with certain interest thereon.

The defences set forth in the notice of intention to oppose the petition filed are (1) an intention to dispute the petitioners' debts, and (2) an intention to move on the return of the petition for the aforesaid stay.

I have dealt with the second point. There could be nothing in the first. For one thing, the company, owing to the admittedly defective condition of its books for the period in which the debts were incurred, is in no position to wage a successful dispute, and for another, the claims of the petitioners were admitted under the order of 1942, and 10 per cent. has been paid on the full amount of each claim. It seems to me that Mr. Whitely correctly described this defence as a "smoke screen." I can see nothing in it.

The real defence is a point of law not mentioned in the notice of intention to oppose.

Section 4(3)(b) of The Bankruptcy Act requires the act of bankruptcy, on which the petition is founded, to have occurred within six months before the presentation of the petition.

The debtor says these were all debts to the petitioners fully incurred by 1942, and no one having a fresh claim is applying and, therefore, no act of bankruptcy has occurred within six months, and the policy of the Act is to prevent the applying in respect of stale claims. It is also conceded that the company

has, since 1942, been paying its way, and there are no debts due to any current creditors (except, perhaps, some not yet accrued).

In view of the fact that only a point of law is involved, I see little use in going into the facts very fully. A few may, however, be of interest. The company was incorporated in 1902 as a private or family corporation. It had been built upon an ancient business which has served the community well for many years, and if I have to order it into bankruptcy I do so with much regret. The depression affected it greatly, and there were family disputes which did the company great harm.

In 1939, Mrs. Coles, widow of George Coles, whose estate claims to be by far the largest creditor, applied for a receiving order, and the Premier Trust Company was appointed interim receiver. After an interval of two months a proposal was made under The Companies' Creditors Arrangement Act which was approved by the creditors and sanctioned by my order of 18th January 1940. The proposal provided for management by the Premier Trust Company, assisted by a committee representing the creditors. No substantial reduction was made in creditors' accounts and a further proposal to creditors was made in 1941. This proposal was sanctioned by Henderson J.A. on 10th April 1942.

The principle behind the agreement was that each creditor having a claim of over \$25 was to be paid 100 per cent. of his claim in the following instalments: 5 per cent. in 60 days and the balance, 20 per cent., with interest, on or before 31st December 1942, 25 per cent. on or before 31st December 1943, 25 per cent. on or before 31st December 1944, and the balance on or before 31st December 1945. Debentures to evidence such were to be issued, but these were not issued.

I have not gone into the claim of Mary Coles as the same is in litigation, or considered whether such claim is secured, in whole or in part, or who now owns it. Suffice it to say that it apparently exceeds \$200,000, and there apparently was good consideration for same or a goodly part of it, and if she is not a secured creditor (as appears likely) she is an unsecured creditor. She is said to have assigned the claim to one Andrews for some purpose with which I am not now concerned, and there is litigation concerning same.

In the settlement of 1942 she agreed to postpone her claim, which seems to have been conceded at a large amount, to those of the trade creditors (which she is not), until the terms of the proposal and settlement were complied with or until default, which has happened. She was to receive a small periodical payment in the meantime. Her claim, if substantiated, is now on the same basis as those of creditors existing in 1942.

Some or perhaps all of the properties of the debtor company are encumbered as the Premier Trust Company has a large claim against the debtor for which it claims to hold some securities.

The original 5 per cent. was paid to the creditors shortly after the settlement, and since then only a further 5 per cent. has been paid. So the payments due on 31st December 1942, 1943 and 1944 are now in default.

The creditors seem to have been very patient in regard to the carrying out of the agreement, and even as late as 24th June 1944, the committee were willing to make some readjustment. Things went along till 8th December 1944, about which date the company was able to interest a man named Hill to help it out. A most curious letter was then written, signed by the secretary of the company, and sent out. I quote it in full.

"Toronto, December 8th, 1944.

"Dear Sirs:

"I would refer you to the circular letter issued on the 24th of June last to the unsecured creditors of this Company.

"A new Board has been appointed and has been in control since the 16th of November. The new Board has obtained a Report from Messrs. Oscar Hudson & Co., Chartered Accountants, Toronto, on the position as at 28th October 1944 prepared from information supplied by officers of the Company. A copy of this Report is sent herewith.

"A careful study of this Report will show that the terms of the circular letter of 24th June, 1944, were not justified. At that time the Company had no funds available for making any payment nor had proper arrangements been made to secure the necessary funds.

"While the Company is able to carry on from day to day the profits are turned back into the business.

"Friends of Miss Coles have established a fund to assist the re-establishing of the business and this fund has already been drawn upon to effect considerable savings in overhead charges.

"From the Report of Oscar Hudson & Company, it will be seen that *there are no free assets available for any payment to the unsecured creditors*,—the whole assets of the Company are charged with mortgages to secured creditors, considerably in excess of the value.

"In the circumstances, therefore, the Directors have decided to make an offer of 10% upon all claims up to the 12th March, 1942, in full settlement, making a total payment of 20% upon the unsecured claims.

"I have been placed in funds to make the payment and I enclose a cheque for this amount upon your claim as set out below. The cheque is sent upon the condition that by cashing it you undertake if as and when called upon at my expense to execute an assignment of your claim to me in trust for the parties advancing the money and for the Company, pending an Order of the Court being secured terminating the control under the Companies' Creditors Arrangement Act.

"Questions have been asked regarding the Pickering contract. I desire to say that this contract is for operations only. The funds and equipment used in these operations are the property of the Crown in the right of Defence Industries Limited, and are not in any way liable for any debts of this Company. All goods supplied to Pickering are paid out of these funds.

"Yours faithfully,

"W. Murdoch, Acting Sec'y."

"Original Amount of Claim\$

"10% thereon\$"

After confessing that the company was unable to meet the settlement of 1942, it offered 10 per cent. more in full settlement of all claims. That offer was accepted by some of the creditors, and their claims were assigned to the secretary of the company. At the hearing it was announced informally that the offer was increased by 10 per cent. to all creditors, including those who have already settled.

This letter is, to my mind, a confession of insolvency, and also makes it clear that if a new opportunity were granted under

The Companies' Creditors Arrangement Act great injustice might result to the petitioners and others who desire to take their chances on a winding-up in the Bankruptcy Court. (Reference to *Re Bilton Brothers Ltd.*, [1939] O.W.N. 397, 21 C.B.R. 79, [1939] 4 D.L.R. 223, as to voting at meetings under the Act.)

As a result of the letter, forty-seven creditors (no doubt having got tired of waiting), with aggregate claims of about \$26,000, have cashed their cheques and assigned their claims; fifty-three creditors, aggregating \$25,000, have refused and have returned their cheques, on advice from a committee member, awaiting developments.

I realize that the above sketch is incomplete, but it serves, in a rough way, to illustrate the position of affairs at the present time. There are many complications in regard to the claim of the Mary Coles estate, and many questions as to who are secured creditors, and what the nature and amount of those securities are which, of course, will have to be ironed out later.

Those interested or claiming interest in the claim of Mrs. Coles (except Andrews) are opposing the petition, and it may be that, if it is granted, this claim cannot be voted at the first meeting of creditors. That, however, only affects the question of who shall be the trustee and inspectors. In an estate of this magnitude, the trustee can scarcely be anyone but a trust company or some other large organization with machinery for handling such matters, so it can make very little difference who is trustee.

There can be no doubt that the company is insolvent in the ordinary sense. It cannot, and never will be able to, meet in full the claims of its creditors. The only question to my mind is: Have the petitioners status to bring the petition?

On the question of meeting the liabilities generally as they fall due, I have been requested to read, and have read: *In re Shirley*, 8 C.B.R. 612, [1928] 1 D.L.R. 350; *Re Canadian Cap Co. Limited*, 53 O.L.R. 506, 4 C.B.R. 185, [1924] 1 D.L.R. 617; *In re Shellbrook Store, Limited*, 13 C.B.R. 24, [1931] 2 W.W.R. 646; and *Re Raitblat*, 28 O.W.N. 237, 5 C.B.R. 714, [1925] 2 D.L.R. 1219, affirmed 28 O.W.N. 292, 5 C.B.R. 765, [1925] 3 D.L.R. 446. It is unnecessary for me to do more than to refer

to same. Some of them are helpful also on the question raised by the defence herein.

Now to come to the sole defence, *viz.*, that there was no available act of bankruptcy within six months of the petition.

Mr. Thompson cited in his aid, *Brown v. Kelly Douglas & Co. Ltd.; In re England & Son*, 32 B.C.R. 143, 3 C.B.R. 812, [1923] 1 W.W.R. 1340, [1923] 2 D.L.R. 738. The gist of that case (a decision of the Court of Appeal of British Columbia) is that where a debtor has failed to pay liabilities on their due dates eighteen months prior to the petition, the mere continuance of the failure to pay such cannot be said to be an act of bankruptcy occurring within the six months. Macdonald C.J.A. said, at p. 145: “. . . the section [4(3)(b)] . . . indicates an intention to exclude stale acts of default on the part of debtors.” Apparently all that took place in that case was that there had been an old default and no new act of admission of inability or anything of that sort. There was here passivity on the part of the debtor, in which the creditor had for a long time apparently acquiesced. The case, although it expresses correctly both the law and the intention of the Act, is easily distinguishable from the present.

By the settlement of 1942, the company, although it had ceased to meet its liabilities, including those of the petitioners, as they became due, entered into an arrangement sanctioned by the Court whereby a new time for payment was created by the agreement as sanctioned. The petitioners and others were precluded from taking any action. It is true that the company, on 31st December 1942, and again in 1943, ceased to meet its liabilities as they became due under the settlement and order. On either of these occasions a petition could have been launched. On 31st December 1944 the debtor company had made another default and ceased to meet the new liability falling due on that date.

The situation is somewhat the same as that where a series of notes has been given: see *Re Canadian Cap Co. Limited, supra*, at p. 186 (C.B.R.). But if that were not so, the situation dealt with in *Re Raitblat, supra*, would prevail. In that case the debts were over six months old at the time of the petition, but within the six months' period the creditors pressed for payment and the debtor, within that period, admitted that he was unable

to meet same. Fisher J. held such an admission to constitute an available act of bankruptcy within the six months' period.

In the present case we have the creditors agreeing to a compromise in 1942. New starting-points for payment of their debts were fixed. There is no acceleration clause as such in the agreement, so each instalment stands on its own footing. The effect is the same as a series of notes. But even if there was no default in the six months' period, there has been, by the letter of 8th December 1944, an admission of failure within that period, and that, to my mind, would be sufficient.

The usual receiving order will go.

The appointment of a custodian has caused me some anxiety. For many reasons it is my opinion that the Premier Trust Company, nominated by the applicants as custodian, should not be trustee. There is much dissatisfaction with its management, and some question as to not only its claims but also its security which will likely give rise to litigation. I will have to leave the question of trustee to the good sense of the creditors.

However, the Premier Trust Company is familiar with the books and business of the debtor, and it would only be disturbing if the Court appointed someone else as custodian. I think it would be the logical custodian, and I appoint it as such. The application for stay will be dismissed. The petitioners will have the costs of the petition and application out of the estate of the debtor. No other order as to costs.

Receiving order made.

The debtor company appealed.

15th March 1945. The appeal was heard by HENDERSON, LAIDLAW AND ROACH JJ.A.

C. A. Thompson, for the appellant: No available act of bankruptcy has occurred within six months before the presentation of the petition, as required by s. 4(3) (b) of The Bankruptcy Act, R.S.C. 1927, c. 11: *Brown v. Kelly Douglas & Co. Ltd.*; *In re England & Son*, 32 B.C.R. 143, 3 C.B.R. 812, [1923] 1 W.W.R. 1340, [1923] 2 D.L.R. 738. Ceasing to meet liabilities is a definite act. It is something that can occur only once; there cannot be a series of ceasings to meet liabilities. [HENDERSON J.A.: Is not this the exact converse of *In re England?*] Once a person ceases to meet his liabilities, he cannot again

cease. [HENDERSON J.A.: Can he not cease to do something else?] There has been no new ceasing in this case. The ceasing was long before April 1942.

Since 1942 the appellant has been paying its way, and in view of the substantial progress that has been made in compromising the claims of creditors, and in view of the fact that the ownership of the claim of the late Mary E. Coles amounting to \$230,033.39 is in dispute and in litigation, we ask that in the exercise of the discretion given to the Court by ss. 4(7) and 163(10) of The Bankruptcy Act, the proceedings should be stayed. [HENDERSON J.A.: Surely it is in the interest of everyone concerned to put this matter into the hands of a responsible receiver.] The company is being looked after and properly managed. Settlements have been arranged with half of the unsecured creditors. There is no particular urgency for putting this matter into bankruptcy.

We object to the appointment of the Premier Trust Company as custodian of this estate upon the ground that it has a claim against the estate; there are conflicting interests. The Premier Trust Company has shown itself to be more concerned with its own indebtedness than with the rights of the creditors.

John Callahan, K.C., for Mary E. Coles estate: We support the position of the appellant, including his choice of custodian to replace the Premier Trust Company.

Russell Whitely, for the petitioning creditors, respondents: [HENDERSON J.A.: We need not hear you as to the main appeal since we are of the view that the order of the learned trial judge is good. The question now is whether there should be a stay of proceedings. What reasons have you for opposing the stay?] We have been waiting for our money for many years, and at this stage there should not be a stay of proceedings. [LAIDLAW J.A.: How do you regard the appointment of the Premier Trust Company as custodian?] It would seem logical that the Premier Trust Company should be custodian, and we object to the nominee of the appellant for that position on the ground that he is a director of the company. [HENDERSON J.A.: If an action is brought by the appellant against the Premier Trust Company, how would it be proper to have it as custodian? That would be a ridiculous situation.] If a

stay of proceedings is granted, matters would be very difficult unless the position is clarified.

It is unnecessary to show that a debtor has not met all his liabilities in order that he may be declared bankrupt on the ground that he has ceased to meet his liabilities generally as they become due. The word "generally" cannot be interpreted as "entirely": *In re Shirley*, 8 C.B.R. 612 at 615, [1928] 1 D.L.R. 350. The appellant failed to make the payment due on or before 31st December 1944. Such default, failure or neglect to pay is an available act of bankruptcy within the meaning of ss. 3(j) and 4(3) of The Bankruptcy Act: *In re Shellbrook Store, Limited*, 13 C.B.R. 24, [1931] 2 W.W.R. 646. The debtor notified the unsecured creditors of its inability to pay its debts and of suspension of payment of its debts within six months. Such notice constitutes an available act of bankruptcy under the Act: *Re Great Lakes Paper Co. Ltd.* (1932), 41 O.W.N. 83, 13 C.B.R. 380.

J. M. Bullen, K.C., for the custodian: There have already been three arrangements under The Companies' Creditors Arrangement Act, 1933, and default occurred under all of them. Within five days of the making of the receiving order the custodian is bound to notify the creditors and within fifteen days there must be a meeting of the creditors. The matter is in a chaotic state, and the creditors ask that it be put under the surveillance of the Court.

Cur. adv. vult.

16th March 1945. The judgment of the Court was delivered by

HENDERSON J.A.: An appeal from the order of the Honourable Mr. Justice Urquhart of 5th February 1945, granting a receiving order in bankruptcy.

We are all of opinion that the order appealed from, except as hereinafter varied, should be sustained, and the appeal, therefore, is dismissed with costs payable by the appellant company to the respondent petitioning creditors. No other order as to costs.

Upon the application for a stay of proceedings, we are of opinion that, for reasons which sufficiently appeared during the argument, there should be a stay of all proceedings under the receiving order for a period of two months.

The order shall contain a provision for the appointment of Russell R. Grant as custodian. The order shall contain a direction that the business of George Coles Limited may be carried on from day to day in the ordinary course, and that all moneys standing to the credit of the company, and all moneys which shall be received during the carrying on under this order, shall be deposited in a new account in a chartered bank to the credit of the company and the custodian.

The receiving order shall not be deemed to stay the proceedings in an action now pending between George Coles Limited and the Premier Trust Company.

All of the foregoing shall be subject to the further order of the Court.

*Appeal dismissed with costs, subject
to stay and change of custodian.*

*Solicitors for the debtor company, appellant: Aylesworth,
Garden, Stuart & Thompson, Toronto.*

*Solicitors for the petitioners, respondents: Arnoldi, Parry &
Campbell, Toronto.*

[URQUHART J.]

Capital Trust Corporation Limited and Lalonde v. Gordon and Frechette.

Taxation—Municipal Tax Sales—Effect of Certificate Showing No Taxes in Arrear—Mistake in Giving Certificate—Functions of Treasurer and Collector—Estoppel—The Assessment Act, R.S.O. 1937, c. 272, s. 143.

F bought land, and applied to C Co. (a trust company) for a loan to finance the transaction. Because of his wife's refusal to bar her dower, F was unable to give a mortgage of the land, and it was accordingly arranged that title should be taken in the name of L (an officer of C Co.) as trustee for F, and that L should execute a mortgage to C Co. Before the money was advanced, the company's solicitors demanded a tax certificate, and the vendor, who knew that taxes for 1937 and 1938 were in arrear, went to the office of the city collector and gave an uncertified cheque, in return for which he was given a certificate, which he duly handed over to the solicitors, whereupon the transaction was completed. This certificate was signed by the treasurer in so far as it related to the period up to the end of 1935, but by the collector in so far as it related to the years 1936, 1937 and 1938, the rolls for which years had not yet been returned to the treasurer. The vendor's cheque was dishonoured. The City made some efforts to collect from the vendor, and continued to accept only current taxes from F. In 1940 the lands were put up for sale. A solicitors' letter of protest was written on behalf of L and C Co., but nothing further was done to prevent the sale, at which F became the purchaser. L and C Co. now sued F and the city treasurer to set aside the sale, or, in the alternative, for damages.

Held, the action must be dismissed. The plaintiffs might have had a right, before the sale, to sue for a declaration that the City had no lien on the land, or for an injunction to restrain the sale, but they could not attack the proceedings after the sale had been made, and the period of redemption had expired, so that F was absolutely entitled to his deed. It was very doubtful if, in the circumstances, the treasurer would have been estopped by the certificate, even had the action been brought before the sale, from alleging that there were in fact taxes in arrear, since the certificate as to those taxes was not his, but that of the collector, and s. 143 of The Assessment Act made no provision for a certificate by anyone but the treasurer. As to damages, it did not appear, in the particular circumstances of the case, that the plaintiffs had suffered any damages.

AN ACTION to set aside a tax sale, and for other relief, more fully set out in the reasons for judgment. The plaintiff Lalonde was the manager of the mortgage department of the plaintiff company, and the defendant Gordon was treasurer of the City of Ottawa.

8th March 1945. The action was tried by URQUHART J. without a jury at Ottawa.

A. G. McHugh, K.C., for the plaintiffs.

G. C. Medcalf, K.C., for the defendant Gordon.

W. F. Schroeder, K.C., for the defendant Frechette.

21st March 1945. URQUHART J.:—Action by the plaintiffs to set aside a tax sale made by the defendant Gordon to the defendant Frechette, on the 13th day of October 1943, of a certain building and land in Ottawa, of which the plaintiff Lalonde, in his capacity of trustee for the defendant Frechette, was, at that time, the legal owner, and the plaintiff trust company was mortgagee; a declaration that there are no arrears of taxes chargeable against the said lands, or, in the alternative, damages to the extent of any loss sustained by the plaintiff by reason of said sale.

At the trial almost all of the parties asked to make amendments, the most important of which is the request of the plaintiffs to plead estoppel against the defendant Gordon. I think it advisable to allow all of these in order to have the matter as fully litigated as possible.

The facts are simple and nothing turns on the credibility of witnesses. Lalonde, Gordon, Anderson and Frechette are all men of very high calibre, and each has been very fair in his evidence.

In March 1939 one Pothier, an Ottawa lawyer who is now in the penitentiary for dishonesty, and the defendant Frechette,

entered into an oral agreement whereby Frechette was to purchase the property in question. This property stood in the name of Pothier's wife (although it is probable that it was actually Pothier's). There was no writing between Pothier or his wife and Frechette, but Frechette paid to Pothier \$400 in cash as a deposit. There was an understanding between them that the property was to be free and clear, especially as to taxes. Also I think that s. 4 of The Vendors and Purchasers Act, R.S.O. 1937, c. 168, would apply in this regard.

The property was encumbered at the time with two mortgages, both of which had been recently put on by Pothier's wife, who had only recently acquired the property. Oddly enough, each of the solicitors who acted for the mortgagees had failed to ascertain if there were any arrears of taxes. There were substantial arrears when these mortgages were put on.

Frechette had not the money with which to swing the purchase, and so he applied to the Capital Trust Corporation Limited for a loan for the full amount of the purchase price, *viz.*, \$8,000. Frechette was a substantial man and a good client of the trust company. He owns four apartment buildings, worth a net of over \$50,000. He is on the best of terms with his wife, but she is a suspicious woman, who is mistrustful of mortgages, and will not release dower in any of his properties, fearful that if a mortgage is put on, the property will be speedily lost. Knowing that he could not get her signature, Frechette went to the plaintiff Lalonde, with whom he was friendly, and by whom he is well regarded, to discuss ways and means. Lalonde suggested that (subject to the approval of the plaintiff trust company, which approval was given) he would take the deed in his own name, in trust for Frechette. The trust company, at the same time, agreed to advance the \$8,000 on the property, with a mortgage on another equally substantial property belonging to Frechette, added as collateral. Frechette, of course, could not get his wife's signature on the collateral mortgage either, but the trust company agreed to take such as collateral without the bar of dower.

Pothier had offered to draw the deed and the mortgages for Frechette, free of charge. Lalonde and Frechette discussed the question of title. Frechette was anxious to be put to as little expense as possible. Lalonde told him that the Capital Trust Corporation Limited would have the title searched, and

that its solicitor would guarantee the title to it, but if he was not satisfied, he could consult their solicitor. Lalonde also suggested that it would be a good idea if some other lawyer than Pothier would draw the documents, but Frechette said that he didn't want to offend Pothier. He also said that he had heard peculiar things about Pothier, and wouldn't buy unless he was certain of the title, and it was certified by some other solicitor. The mere fact of Pothier's drawing the documents as an accommodation did not make him, in my opinion, solicitor or agent for either Frechette or the plaintiffs.

Messrs. McHugh & McDonald, the trust company's solicitors, duly searched the title and gave a certificate that the mortgage in question was a first charge on the lands covered by it. The transaction was completed on 29th March 1939, deeds and mortgages having been registered some days earlier.

Existing mortgages were paid off, Mrs. Pothier got a cheque for \$159, and Frechette got the bulk of his deposit back, out of the mortgage money. So far as the trust company is concerned, it was a routine transaction duly documented.

What happened in regard to the taxes was this: Mr. McHugh, solicitor for the trust company, searched for taxes and discovered that there were arrears at the end of 1938 of over \$700. He told Pothier that he would have to supply him with a tax certificate, at least to the end of 1938. In the course of a day or so, Pothier came in urgently and asked for the release of enough money to pay off the existing mortgages, but Mr. McHugh refused unless the arrears of taxes were cleared up. Between 4 and 5 p.m. of the same day, Pothier came in and threw down a tax certificate, showing no arrears, and said, "There you are." Then the release order for payment of the mortgage moneys was given. Taxes for the first quarter of the year 1939 were not adjusted, as the tax bills were not yet out, and Mr. McHugh was only concerned with the interests of his client, the trust company, as mortgagee. Apparently Pothier had gone into the tax collector's office, had handed in his own cheque, dated 24th March 1939, (uncertified) to the cashier, got a receipt from him, had taken the receipt to one Pinard, a clerk in the office, who signed the lower half of the tax certificate on behalf of the tax collector.

The rolls for the years 1936, 1937 and 1938 had not then been returned to the treasurer, so that his office thought that

it was only able to give the required certificate up to that point, leaving it to the collector to certify up to the end of 1938. One of the questions of law which arises is concerned with this.

The certificate is in the common form in use at the time, in cities at least, and it reads:

"CORPORATION OF THE CITY OF OTTAWA
TAX CERTIFICATE

No. 11799 Treasurer's Office, 24th March 1939.

"I hereby certify that there are No arrears of Taxes on Parts of lot 23 & 24 on the North side of St. Patrick Street, up to the 31st December, 1935, and that no sale for taxes has been made for the past 18 months on the above mentioned property.

“M. H. Chapman”

for Treasurer.

"I hereby certify that there are No arrears of Taxes on the above lot up to 31st December, 1938.

“Fee . . . Free

“Lo Pinard”

for Collector."

The method followed at that time in giving certificates was adopted by the treasurer's office for convenience, and these certificates, the collector admits, were given with the intention of the public relying on them.

Needless to say, Pothier's cheque was dishonoured. It was put into the bank some four days later (a week-end having intervened), on 28th March 1939.

In the cash book (Ex. 16) it was treated as cash and the ledger sheet showed how it was distributed according to taxes and interest for 1937 and 1938. The item \$794.45 was never charged back that I can see.

The cheque was held in the collector's office for four or five months, during which efforts were made to cash it, but without success. It was never cashed, and the taxes for 1937 and 1938 were never paid. Curiously enough, no effort was made by the treasurer or the collector to collect from the legal owner, Mrs. Pothier, who is said to be a woman of property, nor has any effort been made by Frechette or either plaintiff to recover same from her.

The next thing of importance that happened was that Frechette, who had become assessed as owner, received his

first tax bill, that for 1939, shortly after 1st April 1939. I find that it did not show any arrears. It is evident that the treasurer or the collector thought he had some chance of collecting the amount of Pothier's cheque up to that point. There was an error in this bill as first rendered, *viz.*, that \$84.53 charged for roadways was omitted. So a corrected bill was rendered, not showing any taxes as being in arrear. I believe Frechette in this regard, notwithstanding an apparent contradiction by Lalonde in his examination for discovery. Lalonde's statement is not absolutely inconsistent with above.

However, in June or July 1939, I would think after payment of the first instalment on 19th June 1939, someone told Frechette that there were taxes in arrear, and so he went to a clerk named Racine, who soothed his fears with a statement which is objected to, and which I do not consider.

In January 1940, the city auditor in a statement advised Frechette that there were these taxes in arrear. The result is that as early as 1939 (Lalonde knowing about the arrears sometime during that year) the mortgagee could have minimized any loss by paying up the arrears and adding the amount to the mortgage debt, and thus saving a great deal in penalties and interest. If damages are awarded the measure would probably be the amount due at that time, *viz.*, close to \$700. However Lalonde felt, as trustee for Frechette, that this would be a betrayal of his trust, and both mortgagee and trustee decided to stand or fall by the certificates. Frechette continued to pay, and the treasurer or collector to receive, the current taxes.

In October 1943, in spite of a letter of protest from Frechette's solicitors, the treasurer put up the property for sale. At the sale Frechette became the purchaser. Frechette has not yet got his deed but merely a certificate of sale. The twelve months' period for redemption has now passed and he is entitled to his deed.

So the situation now may be, subject to the question of law raised, that Lalonde, as legal owner and trustee, is cut out, as is the Capital Trust Corporation Limited as mortgagee. Frechette has become the owner. The Capital Trust Corporation Limited still has the collateral mortgage, but no bar of dower, as its sole security.

Frechette is, as I have said, an honourable man. He is willing to give the land, which he purchased at the tax sale, as security, but if the trust company takes it it will have a second property as security without the wife's bar of dower. It argues that its security is impaired. The trust company can sue only Lalonde on the covenant in the principal mortgage, but of course it could sue Frechette on the covenant in the collateral mortgage. It says it should not be put in that position against a valuable client.

Frechette still acknowledges the debt. The mortgage was drawn originally for five years, with a substantial sum payable on account annually. It matured in March 1944, and it being at 5½ per cent., the trust company has allowed it to run on as an overdue mortgage. It has received to date on account of principal the sum of \$3,150, leaving a balance of \$4,850 still payable. Frechette, who is only 55 (his wife being 54), will continue to liquidate the mortgage, and I have no doubt that in course of time the mortgage will be fully paid off.

The matter therefore, as far as the Capital Trust Corporation Limited is concerned, seems to be almost an academic one. It is morally sure of getting its money. Its only possible complaint is as to the impairment of its security, as I have pointed out.

As to Lalonde, as trustee and legal owner he has been cut out, but he feels that he owes not only a moral but a legal duty to the *cestui que trust* that, having relied on a certificate, he should not be made to pay taxes that another owed and which he was assured by the certificate had been paid.

No objection is made to the tax sale on account of any irregularity in the proceedings themselves, so I take it that assessments, warrant, advertisements, the auction, etc., were regular. The only objection taken to the sale is not that the taxes were not actually unpaid (unless an argument advanced by the plaintiff that the above-mentioned cheque constituted payment is sound), but that, the certificate above referred to having been given showing that the taxes for non-payment of which the lands were ultimately sold had been paid, the treasurer is estopped from alleging that they were not.

The plaintiffs take the position that they were induced to carry out the purchase and the loan above referred to by reason

of the above-mentioned tax certificate. Part of this certificate, as may be seen, was signed by the treasurer (*i.e.*, up to the end of 1935), the remainder, to the end of 1938, by the collector. The plaintiffs say that the treasurer, notwithstanding his certificate, made the tax sale, basing it upon the very taxes which were certified by his department to have been paid.

Section 143 of The Assessment Act, R.S.O. 1937, c. 272, reads as follows:

“(1) The treasurer shall, on demand, give a written certified statement of the arrears due on any land, and he may charge twenty-five cents for the search and certified statement on each separate parcel not exceeding four, and for every additional parcel, a further fee of ten cents; but he shall not make any charge to any person who forthwith pays the taxes.

“(2) The certified statement aforesaid may be according to Form 9.”

It is argued that it was the imperative duty of the treasurer to issue the certificate himself, and that if, by his office practice, he allowed the collector to sign and issue part of the certificate, the collector did it for him, but that the responsibility would still be the treasurer's.

The above-quoted section provides that the certificate may be according to Form 9. This form seems to contemplate that the city treasurer will give the certificate himself. On the contrary, however, it seems also to contemplate only that it would be a certificate in respect of taxes returned to him. In this case the treasurer did not make any attempt to follow the form.

In some jurisdictions, the Assessment Act provides that these certificates are conclusive against the municipalities even if taxes are in arrear when the certificate is given. The Ontario Act does not so provide, but it merely makes provision for the giving of the certificate on payment of a fee and in certain cases without a fee.

The treasurer in such case is *persona designata*, and the municipality is not responsible for his negligence: *Canadian Bank of Commerce v. Town of Toronto Junction* (1902), 3 O.L.R. 309; *Warwick v. The County of Simcoe* (1900), 36 C.L.J. 461. Hence an erroneous certificate does not protect a person acquiring the property, for it is not the act of the municipality, or that of a servant for which the municipality is liable.

An erroneous certificate might possibly protect a solicitor from a charge of negligence, although in this particular case, where the solicitor knew that the taxes had been actually in arrear and that the alleged payer was of doubtful character and in arrear, he might have inquired further.

The fact that a certificate is given that there are no taxes due does not pay the taxes, and if taxes still are due the treasurer, unless restrained, can still sell, in my opinion.

The next argument of the plaintiffs is that the taxes were actually paid by the acceptance by the collector of Pothier's cheque: the collector could have refused the cheque, or asked to have it accepted before taking it.

The case of *Smith et al. v. Ferrand* (1827), 7 B. & C. 19, 108 E.R. 632, was cited as authority for that argument. The facts in that case are quite different from the present, and I think the case would not be authority for the above proposition. The taking of a bill, note or cheque *prima facie* operates to suspend the remedy by action to recover the debt until the maturity of the bill, but it does not suspend the remedy on a secured debt, and, in any kind of debt, if the bill is dishonoured the condition of payment is broken and the debt revives: see Falconbridge on Banking and Bills of Exchange, 5th ed. 1935, pp. 833-4).

I cannot see that the acceptance of a cheque (a mere order on a bank), even from a third party, would in any way constitute payment of taxes which are secured by a lien upon the lands.

In *Collings v. The City of Calgary*, 55 S.C.R. 406 at 407, 37 D.L.R. 804, [1917] 2 W.W.R. 241, Brodeur J. pointed out that the tax collector was not authorized to receive payment of taxes in other than legal tender.

Also in *The Township of Glanford v. Ferris*, [1935] O.W.N. 305, Middleton J.A. said:

"It is not to be supposed that the Legislature intended the right of the municipality to recover taxes should be lost by reason of any neglect or misconduct on the part of any clerk or officer of the municipality."

The collector in taking an uncertified cheque for taxes did not bind the municipality, and that fact did not constitute payment of the taxes, nor the loss of the lien on the lands, nor

interfere with the right to sell for non-payment of such taxes; see also *The Assessment Act*, s. 99 and *Dunn v. City of Moose Jaw*, 14 Sask. L.R. 445, 60 D.L.R. 397, [1921] 2 W.W.R. 881.

The next argument advanced by the plaintiffs was that the defendant Gordon was estopped by the certificate given.

Estoppel was not specifically pleaded, but as the facts on which the argument is based are set out with great clarity in the pleadings, and estoppel appears to be a logical argument thereon, I allowed the plaintiffs to amend by setting up estoppel, if in fact it is necessary: see *Simonite v. Moxam*, 38 Man. R. 113 at 133, [1929] 1 W.W.R. 513 at 522, [1929] 1 D.L.R. 825. An amended reply setting up estoppel has now been filed.

The form of estoppel set up in this case is estoppel by conduct. The principle is stated in *Ogders on Pleading and Practice*, 12th ed. 1939, p. 207, as follows: "If A by words or conduct induces B to believe that a certain state of things exists, and B in that belief acts in a way in which he would not have acted unless he so believed and is thereby prejudiced, then A cannot in any subsequent proceeding between himself and B or anyone claiming under B be heard to deny that that state of things existed." Off-hand, all the elements of estoppel would seem to be present here.

It has been held that an owner can become a purchaser at a tax sale and thereby cut out all other interests: *Soper v. City of Windsor* (1914), 32 O.L.R. 352, 22 D.L.R. 478, following *Stewart v. Taggart* (1872), 22 U.C.C.P. 284, and *Tomlinson v. Hill* (1855), 5 Gr. 231.

In *Tomlinson v. Hill* at 232, the Chancellor (Blake C.) said: ". . . . it follows that a conveyance . . . in pursuance of a sale for arrears of taxes operates as an extinguishment of every claim upon the land and confers a perfect title under the Act of Parliament."

In the present case it does not appear that the defendant Frechette made use of his position as beneficial owner to obtain any advantage at the sale. He purchased and paid over his money in the same manner as any other purchaser would have done. The result, therefore, is that he has effectively cut out the mortgagee and his trustee from any right, title or interest in the lands, according to the above authorities.

One of the cases relied upon by the plaintiffs is *Melynk v. The City of Sydney*, 7 M.P.R. 428, [1934] 2 D.L.R. 74 (Nova

Scotia Supreme Court *in banco*). In that case, lands had been sold for taxes and the municipality was the purchaser. The owner, who had still one year to redeem, sold the property to a stranger who applied to the city collector, before purchasing, for a statement of taxes and charges against the property. The statement set forth all the City's charges against the property but failed to mention the tax sale or any amount due for redemption therefrom. Only arrears subsequent to the tax sale were shown, and these the purchaser paid, thus completing the purchase. The City was held to be estopped from setting up non-payment in a suit by the purchaser for a declaration that the City was estopped from asserting any ownership or lien on the lands in question. The City was not deprived of remedies against the former owner.

This case is different from the present in a number of important matters:

(a) The collector was not, as is the treasurer under our Act, a statutory officer. He had authority to give the statement.

(b) The tax sale which was impeached was long before the certificate and negated by it, whereas in the present case the tax sale was allowed to go on and is being impeached in these proceedings.

(c) The City was the owner of the lands and in a position to make good.

The remedy sought there seems to indicate what should have been done in this case before sale. When the threat of sale was first made, or even when the auditor's claim came in in 1940, the plaintiffs or Frechette should have sued Gordon for a somewhat similar declaration and/or an injunction.

I do not think that the City is the proper party to be sued under our jurisdiction, but think that any action should be against the treasurer: *Mills v. McKay* (1868), 14 Gr. 602; *Black v. Harrington* (1865), 12 Gr. 175; *Cummings v. Township of York*, 59 O.L.R. 350 at 353, [1926] 4 D.L.R. 97. Similarly, if there is any remedy in this case, the suit is properly constituted and the municipality need not be a party in my opinion.

The parties admit that s. 189 of The Assessment Act obliges the City to refund the money which the defendant Frechette has paid if the tax sale is set aside.

I have mentioned an injunction. It seems to me that the plaintiffs may have had an effective remedy in their hands.

It is my opinion that they should have tried by injunction to restrain the proposed tax sale. Such sales are restrained where a sufficient ground for relief is shown, or where it will produce an irreparable injury: *The Central Vermont Railway Co. v. The Town of St. Johns* (1887), 14 S.C.R. 288, 4 Cart. 326; *Ontario & Minnesota Power Co. v. Town of Fort Frances* (1911), 18 O.W.R. 514.

Whether such a suit would have succeeded it is not my province to decide, but I think the plaintiffs should have acted at that particular period of time rather than wait as they did.

The plaintiffs contented themselves with a lawyer's letter of protest, and then allowed the sale to take place, and the defendant Frechette to purchase and to receive a certificate of sale, before the action was brought, and the year of grace has expired, thereby entitling him absolutely to receive his deed.

Other cases relied upon for estoppel, while restating the general principle, are not helpful because of great differences in the facts. *Town of New Toronto v. Aull*, [1933] O.W.N. 661, is a case where a certificate was given that no taxes were due, but there was on foot a scheme to provide toilet facilities to the house in question, chargeable on the land. The plaintiff loaned on the strength of the tax certificate, and was much chagrined later to find the land charged with this debt. There were, however, no taxes actually in arrear at the time of the giving of the certificate and the Court held that the new taxes had priority. The learned trial judge, Kerwin J., said, at p. 665: "The question, therefore, need not be considered as to the general effect of such a certificate and as to whether a municipality's claim for taxes could be prejudiced by a certificate which was admittedly incorrect." In fact I am unable to find any case which specifically covers that situation, and I am of opinion that such a certificate would not or could not prejudice taxes actually in fact due.

Now, in addition to the cases being different from the present, what other factors are there operating against estoppel?

In the first place the defendant Gordon, the treasurer, can hardly be estopped in any event by the document. His part (*i.e.*, the statement up to the end of 1935 based on rolls returned to him) is correct. What is wrong is the statement of the collector, a separate officer.

I think Form 9 shows that the Legislature contemplated only that the treasurer should give a statement based on rolls

returned to him and that the public could not rely on the collector's statement, which shows it to be that of the collector only, as being binding upon the treasurer in order to create an estoppel. He had not yet received the rolls, and had nothing from the collector in the shape of a statement, sworn or unsworn.

The collector, by s. 108, upon receiving the roll, is under a duty to collect the taxes mentioned in it. By s. 120, he has to return the roll to the treasurer by a certain date, in this case extended by by-laws for each of the years 1937 and 1938. By s. 121, the roll must be supported by an oath certifying it. These sections would seem to indicate that the treasurer in giving a certificate would have to have more than a mere inquiry to go on: he can only certify in respect of taxes returned to him, and they must be returned to him with a considerable amount of solemnity.

It seems probable that on the analogy of *Kissock v. Jarvis* (1859), 9 U.C.C.P. 156, there can be no estoppel against the treasurer when sued as an individual by reason of a document executed by him exclusively as a public officer (see p. 159).

Having regard to the above authorities and considerations, it is very difficult to see how the doctrine of estoppel can be applied to circumvent the sale. Even if, as suggested herein, a suit for a declaration or an injunction had been brought before sale, it is doubtful if estoppel could have been invoked. However, it would be far more appropriate before than after the sale had been held and a certificate of sale issued. The tax sale has become a *fait accompli*. The certificate of sale is provided for by s. 170 of The Assessment Act. It further states that a deed to the purchaser will be executed by the proper officials on demand at any time after the expiration of the period of redemption. This certificate is the "emphatic point" under which the purchaser becomes the effective owner upon failure to redeem within the statutory period, and as a consequence the purchaser is absolutely entitled to a conveyance of the land thereafter: *McConnell v. Beatty et al.*, [1908] A.C. 82, C.R. [1908] A.C. 166, 11 O.W.R. 1, 44 C.L.J. 236; *Excelsior Mining Co. v. Lochead* (1915), 35 O.L.R. 154 at 161, 27 D.L.R. 762. By the certificate the purchaser acquires certain rights of ownership, which I need not elaborate upon here.

We have, therefore, non-payment of the taxes for the years 1937 and 1938, sale proceedings which are regular, the sale duly made, the treasurer not estopped, the time for redemption allowed to run, and Frechette's title made perfect, although when the writ was issued the time had only started to run. I cannot see any way to set aside the tax sale, nor can I make a declaration that there were no arrears of taxes. As to the alternative claim, I cannot see that either plaintiff has suffered damage, but if such was suffered it should be limited to the amount of taxes due at the time when the plaintiffs first became aware of the real tax situation, *viz.*, in July 1939. That amount can be easily ascertained, and should not much exceed \$700.

It being my opinion that Gordon could only give a certificate based on the rolls actually returned to him at the time, and the certificate given as to subsequent years having been given by an independent officer, Gordon could hardly be held liable for any damages in any event. There is another aspect of the problem to which I have given little consideration. There is no evidence that Mrs. Pothier, who was said to be a woman of property, and who was obligated to pay the taxes, has ever been asked to pay such or has refused to do so, which creates somewhat the same situation that existed in *Dunn v. Moose Jaw*, *supra*—see the reasons for judgment in that case.

The action will be dismissed, but without costs, as the defendants created the situation in question. In dismissing the action I am expressing no opinion as to the legal rights (if any) of Frechette against the City of Ottawa or the defendant Gordon, as such rights have not been in litigation herein. It may also be that as to damages the defendant Gordon may have a perfect defence under The Public Authorities Protection Act, R.S.O. 1937, c. 135, s. 11, but in view of the rather vague wording of the latter part of that section, and my views of the case in general, I have not considered that aspect of the problem.

There will be judgment dismissing this action without costs.

Action dismissed without costs.

Solicitors for the plaintiffs: McHugh and Macdonald, Ottawa.

Solicitor for the defendant Gordon: Gordon C. Medcalf, Ottawa.

Solicitors for the defendant Frechette: MacCraken, Fleming, Schroeder & Burnett, Ottawa.

[COURT OF APPEAL.]

McDougal et al. v. The Township of Harwich.

Drainage—Adoption of By-law for Construction of Scheme—Validity of Proceedings—Notice of Council Meeting—Referring Report back to Engineer for Reconsideration—Number of Signatures to Petition—The Municipal Drainage Act, R.S.O. 1937, c. 278, ss. 2, 16, 17, 18.

The jurisdiction of a municipal council to adopt a by-law for the construction of a drainage scheme being wholly statutory, the provisions laid down by The Municipal Drainage Act (which provisions are obviously designed to protect the rights of interested parties) cannot safely be disregarded, at least where observance is not waived, or where it is not abundantly clear that complaining parties are not adversely affected. *In re Hodgins and The City of Toronto* (1896), 23 O.A.R. 80; *In re McCrae and Village of Brussels* (1904), 8 O.L.R. 156, referred to. Where a municipal council, having received its engineer's report upon a proposed drainage scheme, holds a meeting, at which objections are voiced to the scheme, and refers the report back to the engineer for reconsideration, under s. 18 of the Act, notice must be given, under s. 16, of a further meeting at which the report is to be again considered after its return by the engineer, even if there has been no alteration in it. If such notice is not given, and interested parties do not all appear at the meeting, any by-law then adopted must be set aside. *In re Ferguson and The Township of Howick* (1878), 44 U.C.Q.B. 41; *Re McLean and The Township of Ops* (1880), 45 U.C.Q.B. 325, referred to.

The amendment of the Act by 1906, c. 37, s. 1, impaired the authority of earlier decisions as to the sufficiency of petitions. Since that amendment, it is no longer necessary that a petition should be signed by a majority of the owners found by the engineer to be benefited, provided the petition describes a real drainage area, and is signed by a majority of the owners in that area. *Re Duane and Township of Finch* (1908), 12 O.W.R. 144, referred to. If such a petition is so signed, then the fact that the engineer subsequently thinks that the proposed drain should be taken to a different outlet, and assesses some additional lands for benefit, is not fatal to the sufficiency of the petition.

AN APPEAL from the judgment of a Drainage Referee. The facts are fully stated in the reasons for judgment.

8th February 1945. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW JJ.A.

J. R. Cartwright, K.C., for the appellants: No notice was given, as required by s. 16 of The Municipal Drainage Act, R.S.O. 1937, c. 278, of the meeting at which the engineer's report was finally considered by the council, and the notice of the first meeting was irregular. If the appellants had had the few days' notice required by the statute, they could have armed themselves with the necessary information to question the final report of the engineer and to bring to his attention additional information which might have substantially changed his report. The question of notice has long been established as an extremely important factor in drainage cases: *In re McCrae and Village of Brussels* (1904), 8 O.L.R. 156 at 159; *In re Robertson and*

The Township of North Easthope (1889), 16 O.A.R. 214; *Re Rowland and McCallum* (1910), 22 O.L.R. 418 at 425.

The petition was not a majority petition within the meaning and intent of the Act in that the lands included in the petition did not describe a real drainage area and the petition was therefore insufficiently signed: *In re White and The Township of Sandwich East* (1882), 1 O.R. 530 at 536; *Re Duane and Township of Finch* (1908), 12 O.W.R. 144. The report itself must be set aside because the engineer failed to take cognizance of certain essential matters, and consequently his report reveals a misconception of material facts.

Ralph D. Steele, for the respondent: The appellants were not in any way prejudiced as regards notice required under s. 16 of The Municipal Drainage Act, as they received notice about 21st July 1943, and there was no irregularity after receipt of the same by them, which was the first time they could commence proceedings of any kind, whether irregularities existed or not: *Malahide v. Dereham* (1895), 1 C. & S. 243; *Thackery v. Township of Raleigh* (1898), 25 O.A.R. 226, 1 C. & S. 328; 7 C.E.D. (Ont.), p. 891.

The petition was a majority petition as the petitioners in good faith described therein a real drainage area, and a majority of the owners in the area described in the petition signed it: *In re Montgomery et al. and the Township of Raleigh* (1871), 21 U.C.C.P. 381; 4 C.E.D. (Ont.), p. 47.

Failure to give notice as required by The Municipal Drainage Act, or giving of an improper notice does not invalidate the by-law, but merely extends the time allowed for appealing therefrom, and an appeal in any event can succeed only on the merits: *In re Ferguson and The Township of Howick* (1878), 44 U.C. Q.B. 41; *Broughton v. The Township of Grey et al.* (1895), 26 O.R. 694 at 704. Notice of the first meeting was mailed to the appellants, whether received by them or not, and they knew of the meeting to consider the engineer's report, and attended it and two subsequent meetings and stated their case fully. Unless something in the substance of the report is wrong the appellants should not be allowed to take advantage of a technicality.

J. R. Cartwright, K.C., in reply: We accept the cases which say that there is a heavy onus on us to prove the engineer's report bad. Our real complaint is that we had no opportunity

to present an argument to the municipal council. [LAIDLAW J.A.: My difficulty is to see that you were entitled to any notice under the statute.]

As to the engineer's report, see 4 C.E.D. (Ont.), p. 51.

Cur. adv. vult.

22nd March 1945. The judgment of the Court was delivered by

GILLANDERS J.A.:—This appeal is from a judgment of J. A. McNevin Esq., K.C., Drainage Referee, dismissing the appellants' application to set aside the report of an engineer, and a drainage by-law of the respondent township.

The by-law in question was founded on a petition, purportedly in pursuance of s. 2 of The Municipal Drainage Act, R.S.O. 1937, c. 278. When the petition was presented to the township council it was signed by a bare majority of the assessed owners of the lands described in the petition and entitled to sign. Seven of a total of thirteen qualified owners had signed the petition. The township council instructed their engineer to make an examination of the area to be drained, and a report, plans and specifications and estimates of the necessary drainage work, and the assessments of the lands and roads liable to be assessed therefor. The engineer proceeded to make his examination and duly reported to the council, which, after taking other steps more fully discussed hereafter in dealing with the issues raised, finally passed a by-law authorizing the drainage work proposed in the report.

Various objections were raised by the appellants before the referee and in this court. It is urged:

(1) That the petition, which is the basis for the report and by-law, does not describe a real drainage area, and was not sufficiently signed, within the meaning and intent of s. 2 of The Municipal Drainage Act.

(2) That the report was made on insufficient and incorrect information respecting various physical features of the drainage area, the presence of tile drains, the shifting nature of the soil and the direction and effect of prevailing winds.

(3) That no sufficient notice was given to the appellants, as persons assessed, of the date of the council meeting at which the engineer's report was to be considered, as required by s. 16 of the Act, and that no notice whatever was given to the appel-

lants of the meeting to consider the engineer's reconsidered report, after it had been referred back to the engineer, and that the giving of such notices is a condition precedent to the jurisdiction of the council, and as a result the by-law and subsequent proceedings are void.

- To deal with the first objection:

The lands described in the petition to be drained comprise sixteen lots in the respondent township. In respect of this area thirteen owners were qualified to sign the petition, and of these (after striking off two unqualified petitioners) seven, a bare majority, remained signatories to the petition. In the engineer's report he included and assessed two other lots, or parts of lots, owned by two persons, one of whom is one of the appellants. It is submitted (a) that the area described in the original petition did not constitute a true drainage area, and (b) that the true drainage area included all the lands assessed for benefit in the engineer's report, and on this basis the petition was not signed by the necessary majority.

It is said that the petitioners originally thought that an outlet for the lands proposed to be drained might be found in what is described as the Galloway drain. On this assumption the extra lots added by the engineer would not have formed part of the drainage area. The engineer, however, in his judgment, considered that the drain should be carried to a different outlet, and added two lots to the area described in the petition.

Prior to 1906 there were a number of decisions relating to the sufficiency of petitions, in which there was some conflict of view. In *In re Montgomery et al. and The Township of Raleigh* (1871), 21 U.C.C.P. 381, the question of the sufficiency of the petition was raised, but the decision does not go much beyond laying down a rule for determining the burden of proof when the sufficiency of a drainage petition is called in question.

In re White and The Township of Sandwich East (1882), 1 O.R. 530, held in effect that the petition there was sufficiently signed by a majority of owners of lands set out in the petition, and that it was not necessary that the petition be signed by a majority of all the owners of lands assessed for the benefit where lands, in addition to those mentioned in the petition, were added and assessed by the engineer in his report.

In *Township of Chatham and North Gore v. Township of Dover East and West* (1886), 12 S.C.R. 321, it was held, *inter alia*, on the drainage clauses of the Municipal Act then applicable that a petition there in question was insufficient when not signed by a majority of the owners of property to be benefited by the proposed work.

In *In re Robertson and The Township of North Easthope* (1889), 16 O.A.R. 214, "there was not an actual qualified majority of the owners of the lands mentioned in the petition, nor of those (included) afterwards reported by the engineer as benefited and ultimately settled in the schedule to the by-law": per Hagarty C.J.O., at p. 217. The Court of Appeal held, on the statute there applicable, that there ought to be an absolute majority of all owners declared liable to assessment and contribution by the engineer, and not merely a majority of the persons mentioned in the petition itself as being benefited, before those opposed to the scheme could be lawfully bound, and that unless a petition was signed by such a majority the council had no jurisdiction, and a by-law founded on a petition not so signed was void, though valid on its face. See also *Township of Plympton v. Township of Sarnia* (1899), 2 C. & S. 223.

The authority of previous decided cases was impaired by an amendment to the Act in 1906. In that year, by 6 Edw. VII, c. 37, s. 1, subs. 1 of s. 3 of the Act as it then stood (now subs. 1 of s. 2) was amended. It might be noted that s. 10 of the same amending Act was the forerunner of the provisions now contained in s. 20 of the present Act. Since the amendment in 1906, so far as I know, the point in issue has only been considered in one reported case, that is *Re Duane and Township of Finch* (1908), 12 O.W.R. 144, a decision of Drainage Referee Henderson. He says in part:

"It is perhaps proper that I should shortly state what I understand to be the intention of the Act, with express reference to the effect of the amendment to sec. 3 made by sec. 1 of 6 Edward VII, ch. 37. Since that amendment it is no longer necessary that the petition should be signed by a majority of the owners whose lands are found to be benefited by the engineer who makes the report, but it is still necessary, as it always was necessary, that the petition should describe a real drainage area, which should bear some reasonable proportion to the size and extent of the drainage scheme . . .

"It is the intention of the Act that the township council should pass judgment upon the sufficiency of the area described in the petition, and should see to it that the area is therein fairly described. When a township council does really and fairly exercise judgment upon such a matter, I think I should be loth to review their exercise of judgment . . . What I wish to point out very plainly is that it is not proper to pick out any portion or portions of what is in fact a distinct basin requiring drainage. Subject to the discretion of the township council, the majority are to rule, but they must constitute a real majority, and in no case should the council permit the provisions of the Act to be abused by allowing a real minority to impose upon an actual majority."

In the case at bar I think the township council were justified in approving the sufficiency of the petition as presented. It was reasonable for them to conclude that the lands described in the petition presented might fairly be said to constitute a real drainage area. The fact that the engineer subsequently thought that the proposed drain should be taken to an outlet different from that apparently contemplated by the petitioners, and that he assessed for benefit some lands in addition to those described in the petition, was not fatal to the sufficiency of the petition. It might also be observed that the size and extent of the drainage work proposed in the engineer's report bears a reasonable relation to the area described in the petition for drainage. If the council were justified in viewing the area described in the petition as a real drainage area, the petition was sufficiently signed to comply with the statute and provide a basis for the council proceeding thereon.

As to the second ground of complaint, that the report was made on insufficient and incorrect information respecting various physical features of the drainage area, if it is open to criticise the report here, and the drainage work proposed therein, on such grounds, the objections, I think, have no merit. Mr. McCubbin, the township engineer, is a highly competent drainage engineer, with over fifty years' experience, and a long and intimate knowledge of the area involved. A reading of the evidence indicates that he gave careful consideration to all necessary and relevant factors, and the council were fully justified in concluding, so far as the merits of the proposed work were concerned, that it was proper and beneficial.

In *Re Township of Anderson and Townships of Malden and Colchester South* (1912), 4 O.W.N. 327, 23 O.W.R. 320, 8 D.L.R. 812, Mr. Justice Garrow, in dealing with the criticism of the assessment there proposed by the engineer in charge of the scheme, says:

"He is a statutory officer, sworn to do his duty. He has necessarily to make a close and careful examination and study of the whole premises, and his deliberate conclusions' ought not, in my opinion, to be disregarded, except under clear evidence of error, or unless a question of law is involved."

The objection based on the failure to give the notices required by the Act merits more consideration. Section 16 provides as follows:

"16. The clerk of the municipality shall notify all parties assessed within the area described in the petition, by mailing to the owner of every parcel of land assessed therein for the drainage work, a circular or postal card upon which shall be stated the date of filing the report, the name or other general designation of the drainage work, its estimated cost, the owner's land and its assessment, distinguishing benefit, outlet liability and injuring liability, and the date of the council meeting at which the report will be read and considered, which shall not be less than ten days after the mailing of the last of such circulars or postal cards, and the determination of the council as to the sufficiency of notice or otherwise shall be final and conclusive."

The engineer's report was first filed with the township clerk on 26th May 1943. The clerk was ill, but it is alleged that notices were prepared and mailed by his daughter to all parties assessed, on 5th June, giving notice of a meeting of council, to be held on 14th June, at which the report would be considered. The appellants and another owner within the area testified that they did not receive such notices. Whether received or not, it is clear they were not mailed at least ten days prior to the council meeting, as required by s. 16. The appellants, however, learned of the proposed council meeting and attended, the two Snoblens in person and Mrs. McDougal by her representative. They voiced strong objection to the report, and as a result of the objections made, the council referred the report back to the engineer for reconsideration, as empowered by s. 18 of the Act. After this the appellants, and members of the council, attended informal meetings at the drain on at

least two occasions, where the scheme was discussed. The engineer was apparently prepared to make any amendments to the proposed scheme agreed upon, which were not at variance with his judgment as an engineer, but no agreement was reached, and in due course the engineer returned his report to the council, without amendment, on 6th July 1943.

The township council thereafter met on 12th July and passed a by-law provisionally adopting the report. It is common ground that no notice of this meeting was given, and that none of the appellants was present or heard at the meeting, and it is submitted that failure to give notice of the meeting is, under the circumstances, fatal to the by-law adopting the report. Section 18 of the Act, which authorizes the council to refer the report back to the engineer for reconsideration, provides that, after reconsidering the report and assessment, he "shall report to the council, and the report shall have the same effect and shall be dealt with in the same manner and the proceedings thereon shall be the same as upon the original report or assessment, and it shall not be necessary that the engineer shall make any further oath or declaration." It seems apparent that this requires that the parties assessed be notified of the meeting of the council to consider the report, in the manner provided by s. 16. The fact that, on reconsideration, the engineer did not see fit to amend the report, does not, I think, affect the obligation to follow the required procedure. The discretion given to the council by s. 16 to determine conclusively the sufficiency or otherwise of a notice in pursuance of that section, cannot be read as permitting the council to dispense entirely with the giving of such notice.

The respondent urged: (1) as to the meeting of 14th June to consider the engineer's report when it was first filed, that the appellants, by attending the meeting, voicing their objections and taking part in the proceedings, after which the report was referred back to the engineer, waived any irregularity as to the giving of the notices required, and that, in any event, they were not prejudiced thereby, and (2) as to the meeting on 12th July, when the reconsidered report was before the council and a by-law was passed provisionally adopting the report, that the failure to give notice of that meeting did not, and does not, under the circumstances, invalidate the by-law, but merely extends the time for appealing therefrom, and that, in any event,

whatever rights the appellants have to object to the report are now open to be considered on their merits. In support of this contention reference is made to *In re Ferguson and The Township of Howick* (1878), 44 U.C.Q.B. 41. In that case a drainage by-law had been published without the notice of the holding of the Court of Revision for the purpose of hearing complaints against the assessment, as required by a section of the statute. The by-law was held bad, but the failure to comply with another section requiring publication of a notice, that persons intending to move to quash must serve notice of such intention on the reeve and clerk, was held not fatal to the by-law. Chief Justice Wilson pointed out that the object of the publication of the last-mentioned notice was only to restrict the time for moving against the by-law. Since it was not published, the complaining parties would have longer (one year) to take action. The complainant was, under the circumstances, not harmed by failure to give this notice. However, the notice of the sitting of the Court of Revision not having been given in accordance with the provision of the Act was held to be fatal. The complaining parties had, in effect, been deprived of the right to be heard by a properly constituted Court of Revision, and whether or not there was any just cause for complaint, there was the right to be heard, and, if the decision were adverse, to appeal. These rights had not been waived, and the failure to give the notice was, therefore, fatal; *vide also Re McLean and The Township of Ops* (1880), 45 U.C.Q.B. 325.

It may well be that if the objection were limited to the meeting when the original report was considered by the council, the fact that the appellants attended or were represented, and made their objections, was sufficient to waive their right to object later. In any event, it is doubtful whether the appellants were prejudiced, since the report was, at that time, merely referred back to the engineer for reconsideration.

Such considerations do not apply to the meeting on 12th July. By virtue of s. 17, the council "shall at the meeting mentioned in such notice [that is, the notice specified in s. 16], immediately after dealing with the minutes of its previous meeting, cause the report to be read by the clerk to all the ratepayers in attendance, and shall give an opportunity to any person who has signed the petition to withdraw from it by putting his withdrawal in writing, signing the same and filing it with the clerk,

and shall also give those present who have not signed the petition an opportunity so to do."

In view of the fact that the matter had been rather fully discussed at the two informal meetings at the drain, it may be that the result would not have been different if proper notice had been given, but all interested parties had not been present at these meetings, nor had the appellants done anything to waive their right to notice of the meeting for consideration. In any event, the opportunity not having been offered, it cannot be assumed or concluded that none of the petitioning owners would, if notified and present, have withdrawn from the petition, as they had the right, at that time, to do. If but one of the petitioners had so withdrawn, the petition would then have failed to carry the necessary majority, and the council would not have been justified in proceeding to pass the by-law. The appellants had the right to have that opportunity offered to the interested parties. It cannot be concluded that the appellants have not been prejudiced. In the circumstances, the giving of the notice required was a statutory condition precedent, necessary to be observed in the circumstances to found the authority of the council for the by-law in question.

One is reluctant to interfere with the action of municipal councils in such matters, particularly where, as here, there is no suggestion of bad faith, and where the proposed drainage scheme as designed is not open to any serious criticism, but the objection is more than a mere technicality. The whole jurisdiction of the council in such a matter is statutory, and the provisions laid down by the statute giving the jurisdiction—provisions obviously designed for the protection of the rights of interested parties—cannot safely be disregarded, at least where observance is not waived, or it is not abundantly clear that complaining parties are not adversely affected: *vide In re Hodgins and The City of Toronto* (1896), 23 O.A.R. 80 and *In re McCrae and Village of Brussels* (1904), 8 O.L.R. 156.

For the reasons given, I think the appeal must be allowed and the by-law and report in question set aside, with costs here and below.

Appeal allowed with costs.

Solicitors for the appellants: Clunis & Kee, Chatham.

Solicitor for the respondent: Ralph D. Steele, Chatham.

[COURT OF APPEAL.]

Graham v. Saville.

Fraud and Misrepresentation—Damages—General and Special Damage in Action for Deceit—Plaintiff Induced by Fraud to go through Form of Marriage with Married Man.

The plaintiff, a spinster, went through a form of marriage with the defendant, who had represented to her that he was a bachelor, and as a result of this union a child was born to her. The defendant was in fact already married, and deserted the plaintiff soon after the alleged marriage. The plaintiff sued for damages, claiming only general damages. At the trial, she proved special damage, without objection from the defence, and was cross-examined upon this evidence. The trial judge dismissed the action on the ground that general damages were not recoverable in such an action, and that no special damages could be recovered since none had been pleaded. The plaintiff appealed.

Held, the appeal should be allowed. In view of the circumstances of the trial, leave should now be given to allege and claim the special damages. Beyond this, however, the plaintiff was entitled to recover all the damages sustained by her as the direct and natural consequence of the defendant's fraudulent misrepresentations, and was not limited to special damages. *Wilkinson v. Downton*, [1897] 2 Q.B. 57; *Janvier v. Sweeney et al.*, [1919] 2 K.B. 316, applied. *Karas et al. v. Rowlett*, [1944] S.C.R. 1, relied on by the trial judge, must be read in the light of its particular facts, and was not an authority for the proposition that a plaintiff who sues for damages for acting on a false representation could in no circumstances recover general damages.

Per LAIDLAW J.A.: The wrong called deceit consists in recklessly or wilfully causing another person to believe and act on a falsehood. To create a right of action, it must be established: (a) that the defendant has made a statement which was untrue in fact; (b) that he either knew it to be untrue or was recklessly and consciously ignorant whether it was true or not; (c) that he intended the plaintiff to act upon it; (d) that the plaintiff did act upon it in the manner contemplated or manifestly probable; and (e) that the plaintiff suffered damage as the result of so acting. There must be both fraud and actual damage, and the damage must flow, in the ordinary course of events or in the special circumstances of the case, as a direct and natural consequence of the representation being believed and acted upon. *Derry et al. v. Peek* (1889), 14 App. Cas. 337 at 371; *Smith v. Kay* (1859), 7 H.L. Cas. 750; *Mullett v. Mason* (1866), L.R. 1 C.P. 559, referred to.

AN APPEAL by the plaintiff from the judgment of Hogg J., [1944] O.W.N. 635, dismissing the action. The facts are fully stated in the reasons for judgment of LAIDLAW J.A.

7th February 1945. The appeal was heard by HENDERSON, LAIDLAW and ROACH JJ.A.

G. A. Martin, for the plaintiff, appellant: The trial judge misinterpreted the reasons for judgment in *Karas et al. v. Rowlett*, [1944] S.C.R. 1, [1944] 1 D.L.R. 241. "Special damage" denotes two things: first, money damages, and secondly, actual special damages as distinct from general damages. An action for deceit for injury of the character sustained by the plaintiff was held to lie as far back as 1684: *Anon.* (1684),

Skinner 119, 90 E.R. 56; *Garnaut v. Rowse* (1941), 43 W.A.L.R. 29. The trial judge was doubtful whether or not such an action as the present lies at all, but there are the two foregoing authorities, separated by three hundred years, showing that such an action lies. An action of deceit, while generally considered an action in tort for pecuniary loss, may be maintained also if the plaintiff suffered damage because of the false behaviour of another: Winfield, *Text-book of the Law of Tort*, 2nd ed. 1943, p. 431. The appellant does not necessarily have to prove such damage as can be computed in money. [LAIDLAW J.A.: Is it similar to an action for seduction, in which an action for damages does not lie unless special damage is proved?] There is actual damage in the sense that is required to found an action such as this. In *Garnaut v. Rowse*, *supra*, there was no damage such as this appellant suffered. I refer to 23 Halsbury, 2nd ed. 1936, p. 61, in which it is said what constitutes damage in an action for deceit, and to the cases cited there. [HENDERSON J.A.: What special damages have you proved?] Pregnancy, the birth of an illegitimate child, the humiliation of an announcement in the paper of a marriage which was in fact a nullity. [HENDERSON J.A.: My difficulty is whether or not there has been a loss to this woman's reputation. I cannot see any damage to her character, although one understands that she suffered great mental distress.] An action for deceit lies for injury to the person. In addition to this, she sacrificed her business. [HENDERSON J.A.: Is there any case which deals with damages in relation to humiliation suffered? Is not proving the loss of reputation one of the elements in an action for deceit?] [LAIDLAW J.A.: This appellant certainly suffered injury and pain as a result of the respondent's wrong-doing. Because of him she has become the mother of an illegitimate child.] Mental and moral damage suffered by a woman who is induced by a fraudulent representation to go through a form of marriage which is void, although difficult to translate into terms of money, will found an action for deceit: *Wright v. Skinner* (1866), 17 U.C. C.P. 317; *Beyers v. Green*, [1936] 1 All E.R. 613. In the present case, the action is framed in two ways: breach of contract, and deceit. There is a line of cases which seems to indicate clearly that where a defendant has intercourse with a woman and has obtained her consent on a fraudulent understanding, a case of assault may be made out. *Siveyer v. Allison* (1935),

104 L.J.K.B. 597, may be distinguished on the ground that the young girl did not know what was taking place and considered it a surgical operation. In the cases of fraudulent understanding a woman knows the nature of the act. [LAIDLAW J.A.: This woman was persuaded by a false representation to be party to a criminal act. The respondent committed bigamy. Is there any cause of action against a person who persuades an innocent person to be a party to a criminal act?] The attention of the Court is directed to the case of *Blossom v. Barrett et al.* (1868), 37 N.Y. 434.

In the event that this Court should hold that no action lies in the circumstances for deceit, the appellant asks that she be at liberty to amend her statement of claim by adding a claim for damages for breach of promise of marriage, on the facts disclosed in the statement of claim, and found in her favour by the trial judge. The respondent would be in no way prejudiced because any defence he made to an action for deceit would be what he would put forward as a defence to an action for breach of promise: *Wild v. Harris* (1849), 18 L.J.C.P. 297. [HENDERSON J.A.: How is she injured by breach of promise of marriage? The basis on which damages are assessed for breach of promise of marriage is not here at all.] A loss of earnings could be proved.

E. L. Sparling, for the defendant, respondent: There is no evidence of knowledge on the part of the respondent that his wife was living at the time he went through a form of marriage with the appellant. [HENDERSON J.A.: The Court of Appeal will not reverse the trial judge on findings of fact if there is evidence to support his findings.] This appellant cannot get damages for assault. A plaintiff in an action for deceit cannot recover anything except special damages. Special damages are those which could be assessed in terms of money: *Karas v. Rowlett*, *supra*; 23 Halsbury, 2nd ed. 1936, p. 60, para. 85. [LAIDLAW J.A.: If a person deceives another by a false representation and he suffers in a personal way, has he no cause of action for having sustained personal injury?] This case is parallel to a case of slander, where the words are not actionable in themselves. [LAIDLAW J.A.: Here the damages flow from a false representation.] If the claim had included one for special damages, the defence raised and the way in which it was presented might have been quite different. A litigant should not

be prejudiced to the extent that the appellant is asking this Court to go in the present instance. *Garnaut v. Rowse, supra*, is distinguishable from the present case because here no mental or moral damage was pleaded. In *Beyers v. Green, supra*, the claim was coupled with a breach of promise suit. There is no indication in the report what form the damages took.

G. A. Martin, in reply: Even if we abandon the question of assault, the plaintiff has suffered damage of a very personal nature. *Karas v. Rowlett, supra*, was an action based upon a fraudulent statement, and it should be considered carefully.

Cur. adv. vult.

26th March 1945. HENDERSON J.A. agrees with ROACH J.A.

LAIDLAW J.A.:—The plaintiff appeals from a judgment of Hogg J., dated the 19th day of October 1944, dismissing an action for damages alleged to have been caused by deceit of the defendant.

It will be necessary to consider the sufficiency of the statement of claim and I reproduce the material parts of it as follows:

"1. The plaintiff is a spinster . . . The defendant is a married man . . .

"2. On or about the 10th day of July, A.D. 1942 . . . the plaintiff went through a form of marriage with the defendant . . .

"3. In order to obtain the Plaintiff's consent to such purported marriage the Defendant wilfully and fraudulently stated to the Plaintiff that he was a bachelor and the Plaintiff relying thereon so consented.

"4. The Defendant was not at the time of such purported marriage a bachelor but the husband of Florence Saville, formerly Christian, to whom he was married at the Town of Lindsay, in the County of Victoria, on or about the 9th day of August, A.D. 1922, and to whom he was married at the time aforesaid.

"5. The Plaintiff says and the fact is that the Defendant committed divers assaults upon her person by way of coition, she consenting thereto by her belief that she was the lawful wife of the Defendant.

"6. Subsequently, a child known as Graham Oldroyd Saville was born to the Plaintiff in or about the month of March, A.D. 1943.

"7. The Plaintiff and the Defendant lived together as man and wife . . . after their purported marriage, and sometime thereafter the Defendant ceased to live with the Plaintiff . . .

"8. The Plaintiff has suffered grievous injury to her character and reputation and great damage to her person by reason of the defendant's deceit and assaults alleged.

"The plaintiff therefore claims:

"(a) Five thousand dollars (\$5,000.00) damages;

"(b) Her costs of this action, and

"(c) Such further and other relief as to this Honourable Court may seem meet."

The evidence given at trial by the plaintiff shows and sufficiently proves the facts which I now state. The respondent was married to one Florence Christian on or about the 9th day of August 1922, at the town of Lindsay, Ontario. Subsequently he lived apart from his wife, and immediately prior to 1930 he kept company with the appellant for about a year and a half. After that time she did not see him or hear from him until Christmas Eve 1941. On that occasion he telephoned to her stating that he had been "sick with arthritis in St. Michael's Hospital and didn't want to come back while he was a cripple." He told her then that he was not married; that he had always wanted to marry her; that he never wanted to marry anyone else; and wanted to get married as soon as the appellant could see fit to marry him. The appellant believed him. On 6th July 1942, an affidavit required by a provision (s. 22) of The Marriage Act, R.S.O. 1937, c. 207, before a licence is granted was sworn severally by the parties. That affidavit contains the statements, in part, as follows: "THAT I believe there is no . . . prior marriage or other lawful cause or legal impediment to bar or hinder the solemnization of the marriage, and THAT the contents set forth herein are to the best of . . . our knowledge, information and belief, true in every particular". Part of the contents set forth show the condition in life of the respondent as "Bachelor", and his residence when married "96 Fraser Avenue, Montreal, Quebec." The parties went through the ceremony of marriage on the 10th day of July 1942, and lived together thereafter as man and wife for eighteen days. The respondent then left the appellant and returned to live with a woman with whom he had been living for nine years. He did not subsequently live with the appellant. About March 1943 the appel-

lant was confined to the hospital and a child of the parties was born. It was not in dispute that at the time of the ceremony on 10th July 1942, the appellant was a spinster and the wife of the respondent was then alive and living near the town of Lindsay.

In anticipation of marriage with the respondent the appellant gave up a business of selling fish and chips being carried on by her in the township of Scarborough. She stated that the respondent "promised to support and maintain me and I gave up my business." This was done the week she was to be married and her uncontradicted evidence is that the business produced about \$80 per week after payment of all expenses. The appellant also spent moneys for wedding clothes and incidentals, and estimates that the parts which were of no use after the supposed marriage represent an expenditure of about \$60.

The learned judge had no hesitation in reaching the conclusion that the respondent deceived the appellant. He finds that the respondent "seems to have no moral sense and no scruples in his relations with women", that he made no attempt to ascertain whether his wife was alive or dead, and that his evidence as to why he described himself as a bachelor was "just a tissue of lies". Nevertheless he dismissed the action on the ground that no special damages were pleaded or claimed, and, following the judgment in *Karas et al. v. Rowlett*, [1944] S.C.R. 1, [1944] 1 D.L.R. 241, that where a plaintiff's action is for damages by acting on a false representation he is entitled only to the special damages proved and is not entitled to a further amount as general damages.

I do not propose exhaustively to consider or discuss the distinction between general damages and special damages. Speaking broadly, general damages are such as the law will presume to be the direct, natural, or probable consequence of the act complained of; special damages are such as the law will not infer from the nature of the act. For a discussion of the distinction see *Ratcliffe v. Evans*, [1892] 2 Q.B. 524 at 528.

It cannot be doubted that where it is sought to recover special damages, they must be pleaded and proved: *Butt v. City of Oshawa*; *Wilkinson v. City of Oshawa*, 59 O.L.R. 520, [1926] 4 D.L.R. 1138, referred to by the learned trial judge. The plaintiff is not entitled at trial to prove special damage suffered by him, and cannot subject a defendant to the obligation of

meeting evidence thereof, unless a claim for damage of that kind has been expressly set forth in the statement of claim. The detail with which such a claim must be made varies according to the circumstances. In *Ratcliffe v. Evans, supra*, Bowen L.J., at p. 532, says: "In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done." It is apparent from examination of the statement of claim that no allegation or claim for special damages is contained therein. There is no reference to the sale of the business carried on by the appellant up to the time she went through the form of marriage with the respondent, nor to the wasted expenditure for wedding clothes and incidentals. The nature of that loss is exceptional and may properly be characterized as special damage. There ought to have been allegations of the facts in support thereof and a prayer to recover the amount of such loss. In the absence of such plea, no evidence could ordinarily be adduced at trial to prove those items of damage. Moreover, it would be too late to make an amendment at that time to the statement of claim if it occasioned surprise or prejudice to the defendant. I do not say that an application made at the proper stage of proceedings to amend the statement of claim by setting forth appropriate allegations and prayer for special damages could not succeed. I simply indicate established rules and principles that there must be a concurrence of allegation and proof to support a cause of action for special damages. I do not depart from these principles, but the proceedings at trial in the case presently under consideration must be examined and specially considered. It appears from the record that the plaintiff gave evidence of the loss sustained by her by reason of giving up her business, and also of the wasted expenditures incurred by her in anticipation of marriage. There was no objection made by counsel for the defendant to the admission of that evidence. There is no objection on record that the defendant was occasioned any surprise or prejudice. On the

contrary, the subject was a matter of cross-examination by counsel for the defendant. Under such circumstances, I would not hesitate to grant the appellant leave now to make such appropriate amendment to the statement of claim as may be deemed advisable and necessary to allege the material facts giving rise to the special damage and to claim the special damage proved in evidence. Such an amendment being made, there is no obstacle to the plaintiff's right to recover the special damages suffered by her. I would fix the amount thereof at the sum of \$860.

The learned judge held "that where a plaintiff's action is for damages by acting on a false representation he is entitled only to the special damages proved and is not entitled to a further amount as general damages." He relies on the authority of *Karas v. Rowlett, supra*. The decision in that case must be read in the light of the particular facts and character of the action. I think that it does not decide that a plaintiff cannot, under any circumstances, recover general damages which flow naturally and directly from fraudulent acts of the defendant. In that case the plaintiff was entitled to damages for illegal deprivation of a contractual right. The plaintiff alleged and sought to recover business profits which might reasonably have been expected by him if he had not been deprived of that right. In addition to the recovery of an amount for such damages, a jury awarded him the sum of \$2,000 general damages. This award was made following a charge in which it was stated, in part, that "In a case like this the plaintiff might be entitled to something for worry and trouble if you regard the acts of the defendants as illegal." Kerwin J. was of the opinion that that portion of the charge, quoted in part, was misdirection. He also stated: "The respondent is not entitled to anything beyond what he proved in the way of special damages." Taschereau J. does not decide that general damages may not be awarded under any circumstances. He simply says "this is not a case where general damages may be awarded." Rand J. makes the distinction from the case at bar abundantly plain. He mentions the nature of damages allowable for pain and suffering in the case of personal injury and states: "In this case it is not clear how any such matters could be treated as natural and direct consequences of the fraudulent representations but, in any event, there was no attempt made to prove them." His judgment also

shows, at p. 7, that the damages in that case were "determined on the rules applicable to contractual defaults."

The wrong called deceit is not easily or satisfactorily defined. It consists in recklessly or wilfully causing another person to believe and act on a falsehood. If a representation be made by a person which he does not in fact honestly believe to be true, it becomes a fraudulent misrepresentation. To create a right of action, the following conditions must concur: (a) that a statement made by the defendant was untrue in fact; (b) that he either knew it to be untrue or was recklessly and consciously ignorant whether it was true or not: *per* Lord Herschell in *Derry et al. v. Peek* (1889), 14 App. Cas. 337 at 371; (c) that the defendant intended the plaintiff to act upon it; (d) that the plaintiff acted thereon in the manner contemplated or manifestly probable; (e) that the plaintiff suffered damages as a result thereof. It is beyond dispute that there is no cause of action without both fraud and actual damage. It is likewise plain that the damage must flow, in the ordinary course of events or in the special circumstances of the case, as a direct and natural consequence of the misrepresentation being believed and acted upon. It has been said, *per* Lord Wensleydale in *Smith v. Kay* (1859), 7 H.L. Cas. 750, at p. 775, 11 E.R. 748: "Fraud gives a cause of action if it leads to any sort of damage." But "The only damage of which the law takes cognizance, in an action for misrepresentation, is actual and temporal damage—that is, some loss either of money or money's worth, or some physical injury, capable of being pecuniarily compensated, or some present or contingent liability, or tangible detriment, which admits of being quantified and assessed. Such damage does not include mere mental distress, or the mere loss of social advantages to which no money value can be attached": Spencer Bower on Actionable Misrepresentation, 2nd ed. 1927, p. 151. Actionable damage, as described, can be recovered by a plaintiff in an action for fraudulent misrepresentation for any injury which is the direct and natural consequence of his acting on the faith of the defendant's representations: *Mullett v. Mason*, (1866), L.R. 1 C.P. 559.

It cannot be doubted that the plaintiff, under the circumstances of the present case, suffered actual and temporal damage. There was physical injury, pain, and suffering, in consequence of her pregnancy and the birth of a child. There is likewise "present or contingent liability" and "tangible detri-

ment, which admits of being quantified and assessed." In *Wilkinson v. Downton*, [1897] 2 Q.B. 57, the facts appear from the headnote as follows: "The defendant, by way of a practical joke, falsely represented to the plaintiff, a married woman, that her husband had met with a serious accident whereby both his legs were broken. The defendant made the statement with intent that it should be believed to be true. The plaintiff believed it to be true, and in consequence suffered a violent nervous shock which rendered her ill." The real question to be determined was whether or not the plaintiff was entitled to recover £100 as compensation for her illness and suffering. Wright J., at p. 58, states the ground upon which the plaintiff was entitled to recover such damages: "The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her." He continues, at p. 59: "One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant." In the case at bar all the essentials exist to constitute a good cause of action. The defendant's fraudulent misrepresentation was plainly and wickedly calculated to bring about acts of coition with the plaintiff which he knew might result in physical harm and detriment to her. See also *Janvier v. Sweeney et al.*, [1919] 2 K.B. 316, in which the decision of *Wilkinson v. Downton*, *supra*, is approved. The present facts and circumstances are not unlike those in a number of actions leading to judgments in favour of the plaintiff. See, for instance, *Beyers v. Green*, [1936] 1 All E.R. 613; *Garnaut v. Rowse* (1941), 43 W.A.L.R. 29. In the cases mentioned an allegation of breach of promise was made but I think it is unnecessary presently to determine whether an action lies in that form. It is sufficient for the purposes of the present case to decide that the plaintiff is entitled to recover damages sustained by her as a direct and natural consequence of the fraudulent misrepresentations of the defendant. On the basis discussed I would fix the general damages suffered by the plaintiff at the sum of \$1,000.

My conclusion therefore is that the judgment of the Court below ought to be set aside and judgment entered in favour of the plaintiff for \$1,860 (being \$860 special damages and \$1,000

general damages). The appellant is entitled to the costs of this appeal and of the action in the court below.

ROACH J.A.:—The facts have been sufficiently stated by my brother Laidlaw.

I agree that liberty should be granted to the plaintiff to amend her statement of claim by pleading the fact that in contemplation of her marriage to the defendant she disposed of her business with consequent loss, and by pleading the wasted expenditure for wedding clothes and incidentals, and specifically to claim damages as a result thereof. In the event that the plaintiff so amends, then I also agree that she should recover in respect of those items damages assessed at \$860.

With great respect I am unable to concur in the opinion that the sum of \$1,000 is adequate compensation for the other damage which the plaintiff suffered and which under the law she is entitled to recover. In quantifying that damage, in my opinion, there are elements which should be taken into consideration and which are included in the damages recoverable in such an action, as laid down in *Smith v. Kay* (1859), 7 H.L. Cas. 750, 11 E.R. 748, referred to by my brother Laidlaw, but which, as I understand his reasons, are not within recoverable damages as laid down in that case. I think the damages should not be limited to compensation for "physical injury, pain, and suffering, in consequence of her pregnancy and the birth of a child", and the financial burden of maintaining that child. Supposing that the defendant's acts of coition with the plaintiff had not resulted in her pregnancy, could it be said that, apart from the items included in the award of \$860, she had suffered no damages recoverable under the law? In my opinion there would have been a violation of her person which would entitle her to substantial damages.

Then, too, there is the fact that the plaintiff's chances of marriage have been prejudiced by reason of her unfortunate relationship with the defendant, including the fact that by him she is the mother of an illegitimate child. It is difficult to determine the extent to which those chances have been lessened, and to assess reasonable compensation therefor. In addressing myself to that phase of this case, I am not thinking of her loss in terms of mental distress or social advantages, but rather of her loss

in terms of the comfort of a home maintained by a husband as breadwinner of the household. All that is "actual and temporal damage", "the loss of money's worth". However difficult it may be to assess that damage, the Court should nevertheless struggle to do so adequately.

In my opinion the plaintiff's total damages should be assessed at \$4,000. I would, therefore, allow the appeal and direct that judgment be entered in her favour for that amount, together with costs throughout.

Appeal allowed with costs.

Solicitor for the plaintiff, appellant: G. A. Martin, Toronto.

Solicitor for the defendant, respondent: E. Lloyd Sparling, Toronto.

[HOGG J.]

Hebb v. Mulock and Newmarket Era and Express Limited.

Contracts — Interpretation — Ambiguity — Extrinsic Evidence — Amalgamation of Two Newspapers — Agreement as to Allotment of Shares.

Companies—Powers of Directors—Allotment of Shares—Good Faith—Control of Company.

An agreement was entered into between the plaintiff and M for the amalgamation of two newspapers, one owned by the plaintiff and the other owned by a company in which M held the controlling interest. The agreement provided for the transfer of all the assets of both newspapers to the company (which was to adopt a new name), the assets of the plaintiff's paper being valued at \$2,500 more than those of that controlled by M. The agreement provided for the issue of 161 shares to the plaintiff, and for the retention of 138 shares by M, with a further provision that M "shall have the option of purchasing" a further 25 shares at a price of \$100 per share "at any time within a period of eighteen months from the date hereof." The plaintiff and two solicitors (to whom each of the parties agreed to transfer shares) were to be the directors of the company. M did not pay the \$2,500, or apply for shares, within the 18 months, but, about two years after the execution of the agreement, negotiations for the sale of the plaintiff's shares to M having fallen through, M applied for the shares, tendering the \$2,500 in payment. A resolution was adopted by the majority of the directors accepting this application and allotting the shares to M. The plaintiff now sued to set aside this resolution and allotment.

Held, the action must fail. The "option" clause in the agreement was ambiguous, and extrinsic evidence was therefore admissible to show what the parties had intended. *Adolph Lumber Company v. Meadow Creek Lumber Company* (1919), 58 S.C.R. 306, and other authorities, applied. The conduct of the parties, an announcement made by them, and a clause in the agreement itself, stating its purpose, all showed that the intention was that the plaintiff and M should have equal shares in the control of the newspapers, but that M should first pay the \$2,500 which he owed, and that only upon making this payment would he be entitled to the shares which would make his holding equal

to the plaintiff's. It was not expressed in the contract that time was to be of the essence, and there were no special circumstances making it so. *Gamble v. Wright* (1927), 31 O.W.N. 482, affirmed 32 O.W.N. 193, distinguished. M was therefore entitled to a reasonable time, after the expiration of the fixed period. Further, the announcement published, with the approval of both parties, constituted a collateral agreement for equality of share-holding, part of the entire transaction. *Lindley v. Lacey* (1864), 34 L.J.C.P. 7; *Dunsmuir v. Loewenberg Harris & Co.* (1900), 30 S.C.R. 334, referred to.

As to the claim against the company, the directors, in allotting and issuing the 25 shares to M, had acted *bona fide*, not in violation of the plaintiff's rights as a shareholder. Even if it were assumed that M had lost the right, as against the plaintiff, to have the plaintiff's consent to the issue of these shares, the issue could not be held illegal under the principle laid down in such cases as *Punt v. Symons & Co., Limited*, [1903] 2 Ch. 507, and *Martin v. Gibson et al.* (1908), 15 O.L.R. 623. It was not a question of the directors improperly obtaining control of the company, nor was M, by the issue of these shares, given a majority, or control of the company's affairs. *Harris et al. v. Sumner et al.* (1909), 39 N.B.R. 204; *Spooner v. Spooner Oils Limited et al.*, [1936] 1 W.W.R. 561, agreed with.

AN ACTION to set aside an allotment of shares. The facts are fully stated in the reasons for judgment.

13th, 14th and 19th March 1945. The action was tried by HOGG J. without a jury at Toronto.

R. R. McMurtry, K.C., for the plaintiff.

J. W. Pickup, K.C., and *W. B. Williston*, for the defendant Mulock.

J. J. Robinette, K.C., for the defendant company.

4th April 1945. HOGG J.:—Prior to the month of May 1942, the plaintiff owned and was the editor of a newspaper called "The Newmarket Era", published in the town of Newmarket, Ontario, and the defendant Mulock held a controlling interest in The Express-Herald Publishing Company Limited, which published a newspaper in the same town, under the name "The Express-Herald".

As a result of negotiations between the parties, an agreement in writing was entered into between the defendant Mulock of the first part and the plaintiff of the second part, dated 9th May 1942, whereby the parties agreed to amalgamate the assets of the newspaper owned by the plaintiff and the assets of the company publishing The Express-Herald newspaper. A term of the agreement was that the name of The Express-Herald Publishing Company Limited should be changed to Newmarket Era and Express Limited.

After providing that the assets of the two newspapers should be combined and transferred to The Express-Herald Publishing

Company Limited, and for a change in the name of that company, clause 3 of the agreement reads:

"The party of the first part shall retain one hundred and thirty-six (136) fully paid up shares in Newmarket Era and Express Limited, and shall have the option of purchasing a further twenty-five (25) fully paid up shares of the treasury stock of the Company, at a price of One hundred dollars (\$100.00) per share at any time within a period of eighteen months from the date hereof."

Clause 4 provides that the plaintiff shall be issued 161 fully paid-up shares in the new company as consideration for the transfer by him to the company of the assets of the Newmarket Era newspaper. There is evidence to the effect that the assets of the plaintiff's newspaper were valued, and taken into the amalgamated company, at the sum of \$2,500 in excess of the value placed upon the assets put into the new company by The Express-Herald Publishing Company Limited, and that the defendant Mulock was obligated to the new company in the above amount of \$2,500. The Honourable Mr. Mulock did not pay for the further 25 shares of treasury stock of the new company within the period of eighteen months mentioned in clause 3 of the agreement, and this period ended on 8th November 1943.

It is provided by clause 8 of the agreement, that the defendant may transfer one or more shares of the company to Miss Beatrice E. Lyons, a solicitor of the town of Newmarket, and that she shall act as a director of the company. It is also provided by clause 9 of the agreement that the plaintiff Hebb shall act as a director, and by clause 10, the plaintiff and the defendant Mulock each agree to transfer a share of stock in the company to Mr. Norman Matthews, also a solicitor in Newmarket, in trust in order that Matthews should be a third director of the company representing both parties. The required transfers of shares were made, and the plaintiff, Miss Lyons and Mr. Matthews became the directors of the defendant company.

Clause 13 of the agreement purports to set out its purpose, and reads in part:

"The purpose of this agreement to amalgamate the two businesses is to carry on a printing and publishing business, and in particular to publish an independent weekly newspaper, . . . which . . . shall not owe any allegiance to any political

party, or any other group or individual The directors shall not interfere in the editorial or news policy of the newspaper as above set forth, unless such policy is in their opinion contrary to the spirit of this agreement and to the conduct of an independent newspaper, or is prejudicial to the best interests of the newspaper."

Immediately after the execution of the agreement by the parties they caused to be published in the issue of 14th May 1942 of the plaintiff's newspaper, "The Newmarket Era", an announcement which was given prominence on the front page of that newspaper. This announcement set out that the two newspapers had been amalgamated: that a new newspaper to be known as the Newmarket Era and Express would be published as an independent newspaper to serve the interests of all the people of the district, and that the largest shareholders of the company would be the Honourable W. P. Mulock, who would not be a director, and the plaintiff, Mr. Andrew O. Hebb. This announcement further states:

"The stock will be so arranged that no shareholder will hold a controlling interest, and thus the paper will be free to maintain an independent character."

In February 1944 the plaintiff offered to sell his interest in the company to the defendant Mulock, but some time later he refused to sell. On the 3rd June, as the result of a letter from the plaintiff to Mr. Mulock, Matthews arranged a meeting at which both parties, and Matthews, were present. Both Mr. Mulock and Mr. Matthews said in evidence that the matter of the refusal of the plaintiff to sell his interest in the company for the sum of \$11,500, which had been offered, was discussed, and the plaintiff agrees that the question of his refusing to sell was discussed. As this refusal on the part of the plaintiff to sell was apparently definite, the plaintiff was told at the meeting that the defendant Mulock would pay the \$2,500 to the company, and have the 25 shares issued to him by the company as provided by clause 3 of the agreement, but the plaintiff would not consent, for the reason that the eighteen months mentioned in the said clause had expired, and because the plaintiff had decided to retain a majority holding of the shares of the company. Several days after this meeting Mr. Mulock applied to the company for the issue of 25 shares of capital stock, and tendered his cheque for \$2,500 in payment for the same. Mr. Matthews

and Miss Lyons decided that the proper course to be taken by them, as the majority of the directors of the company, was to allot the stock, but concluded, before such action should be taken, to take the advice of counsel. A directors' meeting was called for the 9th June 1944, and at which the three directors of the company were present. The application from Mr. Mulock for the purchase of 25 shares of common stock of the company at \$100 per share, together with his cheque, was presented to the meeting, and a resolution allotting the shares was carried by the votes of Matthews and Miss Lyons against that of the plaintiff. The plaintiff stated at the meeting that he had no objection to the price offered by Mr. Mulock for the shares.

The plaintiff alleges in his statement of claim that this resolution carried by the directors of the defendant company, purporting to allot and issue to the defendant Mulock the shares in question, is a violation of the plaintiff's rights as a shareholder of the company, and that the two directors voting for the resolution did not act *bona fide*, or in the interests of the defendant company, but were acting in pursuance of an arrangement entered into with the defendant Mulock with the object of altering the voting control of the company in favour of that defendant. The plaintiff claims an injunction restraining the defendant Mulock from voting or dealing with the shares, and an order against the defendant company setting aside and rescinding the said resolution and the allotment and issue of shares to the defendant Mulock.

The defendant Mulock denies that he wished to deprive the plaintiff of voting control in the company and pleads that in applying for the shares he was seeking only to maintain his one-half interest in the control of the company, which he maintains had been the basis on which all negotiations for amalgamation had been carried out. The defendant company, in its statement of defence, pleads that the allotment of the 25 shares to the defendant Mulock was considered by the directors to be in the best interests of the company.

The plaintiff denied at the trial that he had ever said that the newspapers would be amalgamated on a basis of equality between himself and the defendant Mulock. He further said that he had not drawn the attention of Mr. Mulock to the date upon which the so-called option expired. He said the company

owed the bank approximately \$1,000, and that there was only \$75 in the bank account of the company, but that it did not particularly need money as it had assets which could be sold.

Mr. Mulock's evidence is to the effect that in the negotiations and the discussions between the parties leading up to the amalgamation and the preparation of the agreement, the fact that both parties to the agreement should have an equal control in the new paper was the basic and underlying factor. He said that as there was the sum of \$2,500 difference between the value placed on the plaintiff's paper and the value placed upon his own paper, he expected to pay this \$2,500 to the defendant company when requested to do so and to have issued to him 25 shares of capital stock of the company, and that 18 months was mentioned in the agreement as the time within which the money was to be paid because he was under obligation to pay other substantial amounts at the time of the amalgamation and did not wish all payments to fall due at the one time. He said that he expected that as the accounts payable to the Express-Herald Publishing Company Limited were collected, they would be credited upon the \$2,500 to be paid by him, although there was no arrangement to this effect.

Mr. Mulock further stated that it came to his attention for the first time in February 1944 that the 18 months had expired, but that as the matter of a sale to him of the plaintiff's interest in the company was still under consideration, he did not take any step towards offering to pay the \$2,500 for the 25 shares of stock until he learned definitely in June that the plaintiff refused to sell. Mr. Mulock said that he did not consult the directors before applying for the issue of the shares to himself, nor did he know what action had been taken until he was told what had taken place at the directors' meeting.

Mr. Matthews and Miss Lyons considered it to be in the best interests of the company that the directors issue the 25 shares to Mr. Mulock. The reasons which induced them to take such action as directors were: (1) that it had always been the intention that there should be an equality of share-holding and control in the company between the plaintiff and the defendant Mulock; (2) that the company was in need of money, being in debt; (3) that the company could never get as good a price again for its shares, and (4) that if the shares were not issued, the defendant Mulock might start another newspaper.

I have come to the conclusion that the question of the company requiring the \$2,500 from Mr. Mulock could not have been one of the important reasons which influenced the directors to issue the 25 shares in question. Although the company owed certain money on account of equipment and otherwise, and its holdings of cash were extremely small, there is no evidence that the company was being pressed for money, nor is there evidence that the directors had ever been asked for further sums in order to carry on the newspaper, and Mr. Mulock stated he had never been asked to put up the \$2,500 he owed to the company.

The issue as set out in the pleadings is a comparatively narrow one and in arriving at its determination the interpretation to be placed upon the language of the written agreement, and particularly upon the meaning of clause 3, should in the first place be considered in its relation to the action of the majority of the directors of the defendant company in allotting the shares in question.

A primary rule of interpretation is that the language of an agreement is to be understood in its ordinary and natural meaning and that the whole of the contract must be considered in order to ascertain the meaning of any particular part. The general governing principle is that the intention of the parties must be ascertained through the words they have used. Furthermore it is the duty of the Court to ascertain from the contract itself its force and effect quite irrespective of any consideration of the fairness of its provisions.

It was said by Ferguson J.A. in *Sierichs v. Hughes* (1918), 42 O.L.R. 608, 43 D.L.R. 297, in the Court of Appeal, quoting the language of Parke B. in *Ford v. Beech* (1848), 11 Q.B. 852 at 866, 116 E.R. 693, that "It [the contract] ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent."

In *Murphy v. Thompson* (1877), 28 U.C.C.P. 233, Gwynne J., in delivering the judgment of the Court, referred to the rule as laid down by Tindal C.J. in *Shore et al. v. Wilson* (1842), 9 Cl. & F. 355 at 566, 8 E.R. 450: "The true interpretation, however,

of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule . . . that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party."

In *Adolph Lumber Company v. Meadow Creek Lumber Company*, 58 S.C.R. 306, 45 D.L.R. 579, [1919] 1 W.W.R. 823, it was said by the Chief Justice of Canada that if a contract is ambiguous in its terms and a construction has been placed upon it by the conduct and language of the parties, that construction will be accepted by the Court as the true one.

Clause 3 of the agreement purports to be an option, given by the plaintiff to the defendant Mulock, for the purchase of treasury stock of the company. It is obvious that it was not possible for the plaintiff himself to deal in the treasury stock of the company, or to give an option on, or to agree to sell, such stock. Only the directors of the company, acting on its behalf, could give an option, or offer or agree to sell the stock of the company which was still unissued.

It was argued by counsel for the defendant Mulock that the phrase "shall have the option of purchasing" means that Mr. Mulock shall have the right or opportunity, in so far as the plaintiff is concerned, to purchase 25 shares from the company, and that the remaining language of the clause means that the plaintiff is agreeable that the price of these shares shall within a period of 18 months from the date of the agreement be \$100 per share. It is argued that there is no agreement on the part of the said defendant that he shall not purchase or shall not have the right to have issued to him 25 treasury shares upon payment of \$2,500, after the expiration of the 18 months, but that the language means that after this period has expired the plaintiff, as a director of the company, does not consent that the shares shall remain at the price of \$100 per share. It is

argued also that the plaintiff could not bind the company not to sell shares after the 18 months' period. The plaintiff was a director of the company and in this capacity only could he have a part in determining the allotment of the shares of the company and in fixing the price at which they would be issued or sold.

It is argued on behalf of the defendant company that clause 3 is in the nature of a security for the payment within 18 months of the \$2,500 due by Mr. Mulock to the company, for which 25 shares were to be issued to Mr. Mulock, and was intended merely for such purpose.

The true sense and meaning of this clause of the agreement is in doubt, and such being the case I am of the opinion, based upon the authorities which I have cited, that extrinsic evidence may be admitted to show what construction the parties put upon this portion of the agreement themselves, and what was their intention. If I am right in my conclusion that evidence of the surrounding circumstances can be inquired into, I do not think there can be doubt that the parties to the agreement were each to hold an equal number of shares in the company after Mr. Mulock had paid the \$2,500 which he owed to the company, and for which he was to receive 25 shares at the price of \$100 per share. This view is confirmed by the announcement or advertisement which appeared in the plaintiff's newspaper several days after the agreement was executed, and which had been accepted and approved by the plaintiff and Mr. Mulock.

I have concluded that clause 3 of the agreement must be given the meaning that, although it was the intention of the parties that the defendant Mulock was to hold shares of the company equal in number to those held by and issued to the plaintiff, this defendant should pay the \$2,500 he owed to the company within eighteen months from the date of the agreement, and that only upon making such payment did the defendant Mulock have a right to receive at their par value, regardless of what their real value might be at the time, 25 shares of the company, thus making his holding of shares equal to that of the plaintiff.

Apart from extrinsic evidence, the purpose of the agreement, set out in clause 13, that the new newspaper was to be published as an independent weekly newspaper, and the provisions

with respect to the tenure of office of the directors, would tend to show the intention that the parties should have equal control of the newspaper.

It is not expressed in the contract that time is to be of the essence. It is true that in a contract for the sale of property, the nature of the property may make time essential, as, for example, in a contract giving an option to purchase the shares of an incorporated company, the value of which shares may vary from time to time. In *Gamble v. Wright* (1927), 31 O.W.N. 482, affirmed by the Court of Appeal, 32 O.W.N. 193, which was an action for specific performance of an agreement for sale of shares of a joint stock company, H. T. Kelly J. discussed the question whether time was of the essence of such contract. He said, at p. 483:

“As to the defence that time was of the essence of the contract; time may be made essential by the express agreement of the parties, or impliedly from the nature of the property or the circumstances of the case. Here time was not expressly made of the essence.

“Shares vary in price from day to day, and that is why courts of equity have considered such a contract as this to be one in which time is of the essence.”

In the case now under consideration, although the contract purports to be an option given by the plaintiff for the sale of the treasury shares of the company by the plaintiff, it cannot in reality be such a contract, and furthermore the reason why time should be of the essence is not here present, because the price of the shares is fixed. See also *per* Duff J. (afterwards C.J.C.) in *Morton and Symonds v. Nichols* (1906), 12 B.C.R. 485.

I am of the opinion that time is not of the essence of the contract under consideration, and that the defendant Mulock had, therefore, a reasonable time, after the fixed period had expired, within which to pay the sum of \$2,500 and receive the shares from the company. The fact that there were certain negotiations going on for the sale of the plaintiff's interest in the company to Mr. Mulock would be ground for holding that the delay on his part in requesting the consent of the plaintiff to the issue of these shares was not unreasonable.

There is a further point which I think should be considered; that is, whether the announcement which was accepted and

approved of by both parties, and which was published in the plaintiff's newspaper, was an agreement collateral to the written contract of the 9th May 1942, which formed part of the whole transaction. The case of *Lindley v. Lacey* (1864), 34 L.J.C.P. 7, is cited in the text books as a leading authority on this subject. It was there held that an agreement may be made contemporaneously with a written contract as part of the transaction, but without being incorporated with it; such agreement is then collateral to the written contract and may be proved by extrinsic evidence.

In *Dunsmuir v. Loewenberg Harris & Co.* (1900), 30 S.C.R. 334, an agreement in writing for the sale of a coal mine was under consideration and it was contended that there was an alleged verbal agreement which covered the question of compensation for services and outlay, including the payment of a commission on the selling price. It was held that parol evidence was admissible to show that the written document did not constitute the whole of the terms of the contract, but that there had been a collateral oral agreement.

I think it may reasonably be concluded that the announcement constituted a contemporaneous collateral agreement between the parties that their share holdings in the company should be equal.

I am of the opinion that the directors of the defendant company, in allotting and issuing the 25 shares of capital stock of the company, were carrying out the intention of the parties as expressed, and were therefore not acting in violation of the plaintiff's rights as a shareholder of the company, but were acting *bona fide* and in good faith. Having reached this conclusion, the action should be dismissed.

If on the other hand it be assumed that the defendant Mulock had lost his right, by lapse of the said eighteen months, as between himself and the plaintiff to have the plaintiff's consent to the issue of the shares in question, can the issue of these shares by the directors be held to be illegal under the principle laid down in the following authorities cited by counsel for the plaintiff? I am of the opinion, and so find, that the majority of the directors were sincere in their belief that Mr. Mulock had the right to have the shares issued to him, but it is contended on behalf of the plaintiff that even if this is so, the directors were not entitled to make such issue because by so doing they

would not be acting in the interest of the company but in the interest of the defendant in depriving the plaintiff of his majority holding of shares.

The judgment in *Punt v. Symons & Co., Limited*, [1903] 2 Ch. 506, is referred to and considered in practically all of the subsequent cases on the subject. The facts, in brief, are that the directors of the company proposed to pass a resolution to carry out an alteration in the articles of association in order to deal with a situation whereby the business of the company had proved unsuccessful under the management of certain directors and, in order to pass such a resolution, shares of capital stock of the company were allotted to certain of the shareholders. Byrne J., at p. 515, said: "I am quite satisfied that the meaning, object, and intention of the issue of these shares was to enable the shareholders holding the smaller amount of shares to control the holders of a very considerable majority . . . when I find a limited issue of shares to persons who are obviously meant and intended to secure the necessary statutory majority in a particular interest, I do not think that is a fair and bona fide exercise of the power."

The next case which constitutes an authority is that of *Martin v. Gibson et al.* (1908), 15 O.L.R. 623. An allotment of shares was made by the directors of a company, which gave them an overwhelming majority of the shares and gave these directors absolute control of the company. Boyd C. held the allotment to be "a prejudicial encroachment on the voting power of the minority", and the learned Chancellor further said that the manipulation of shares "either with a view to or which results in an unfair control of the voting power, is *ultra vires* of the directorate." He was of the view that the general principle and guide in dealing with the distribution of new stock and the claims of existing shareholders was that "equality is equity".

In *Bonisteel v. Collis Leather Co. Limited* (1919), 45 O.L.R. 195, the defendant company had been carrying on a successful business with the capital it had, and it had saleable assets worth three or four times the par value of the issued shares. The directors made an allotment of shares which was attacked by the plaintiff. Rose J. (now C.J.H.C.) held that the evidence established that the action of the directors deprived the plain-

tiff of the control of the shares and was made for "the purpose of shifting from one body of shareholders to another the power of electing directors and so of controlling the company's policy." He held that the directors had no right to make a one-sided allotment of stock "with a view to the control of the voting power", although the directors may have thought it was in the best interest of the company that the plaintiff should not control its affairs, "and, in that sense, they acted in good faith."

In *Piercy v. S. Mills & Company, Limited*, [1920] 1 Ch. 77, the plaintiff held the majority of shares in the company and wished to become a director. The directors of the company considered the plaintiff undesirable as a director, and, to prevent him from becoming a member of the board, shares of the capital stock were allotted by the directors in order to retain control in themselves and to maintain a majority over the plaintiff. Peterson J. referring to *Fraser v. Whalley*; *Gartside v. Whalley* (1864), 2 Hem. & M. 10, 71 E.R. 361, and *Punt v. Symons & Co.*, *supra*, said: "The basis of both cases is, as I understand, that directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders."

The judgment in *Harris et al. v. Sumner et al.* (1909), 39 N.B.R. 204, was cited by counsel for the defendant company as maintaining beyond question the contention of the defendants in the case at bar. It was there held that the directors of a company may purchase its stock although it is for the purpose of getting control of the company, provided they do not obtain a personal benefit and provided that they honestly believe they are acting in the interest of the company and act *bona fide* and without fraud or collusion.

Counsel for the defendant company also stressed the judgment of the Court of Appeal of Alberta in *Spooner v. Spooner Oils Limited et al.*, [1936] 1 W.W.R. 561, [1936] 2 D.L.R. 634. One of the issues in that case was an allotment of shares which was attacked, and with reference to the claim that such allotment gave control of the company, Harvey C.J.A. said, at p. 562: "There is nothing in the authorities cited that would stand in the way of upholding an issue of shares for the sole purpose of

giving someone control of the company if the directors honestly believed on reasonable grounds that it was for 'the interest of the company that that should be done.' The learned Chief Justice commented on the fact that control of the company had been a cause of bitterness and striving on the part of shareholders, and said: "Such a situation could clearly not be other than detrimental to the best interest of the company and if the directors honestly thought that the matter was of such importance to the company's well being as to require a remedy by putting the control of the company in the hands of one or other of the factions, I am unaware of any legal objection to the issuing of the company's shares for that sole purpose." It is true that these latter decisions are not binding on the Ontario courts.

In the present action it is not a question of the directors obtaining control of the company, nor is the defendant Mulock, by the issue of the twenty-five shares, given a majority of the shares, or control of the company's affairs. The allotment of the 25 shares merely placed the two principal shareholders in a position of equality.

In my opinion there was not such a situation as was before the Court in *Punt v. Symons & Co.*, *supra*, or in *Martin v. Gibson*, *supra*, namely, that the object and intention of the issue of 25 shares to the defendant Mulock was to enable him as a minority shareholder to control the holdings of a very considerable majority of the shares, nor do I think it can be said that the issue of the shares was against the interest of the company and not made in good faith.

The action is dismissed with costs.

Action dismissed with costs.

Solicitors for the plaintiff: Chitty, McMurtry, Ganong & Wright, Toronto.

Solicitors for the defendant Mulock: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.

Solicitor for the defendant company: John J. Robinette, Toronto.

[HOPE J.]

Summers v. The Niagara Parks Commission and Niagara-on-the-Lake Golf Club Limited.

Crown—Immunity from Actions in Tort—Agency of Crown—Niagara Parks Commission—The Niagara Parks Act, R.S.O. 1937, c. 93, ss. 9, 21, 22.

The Niagara Parks Commission, though a body corporate and a separate legal entity, is nevertheless a servant or agent of the Crown, and as such is immune from being sued in tort. *Peccin v. Lonagan and T. & N.O. Railway Commission*, [1934] O.R. 701; *Gooderham & Worts Ltd. v. Canadian Broadcasting Corporation*, [1940] O.R. 130, and other authorities, applied; *International Railway Company v. Niagara Parks Commission*, [1941] A.C. 328, considered and explained.

Negligence—Dangerous Premises—Duty to Invitee and Licensee—Player on Golf Course.

The plaintiff, a playing member of the defendant Club, was injured while playing on the course, in the vicinity of a very old and disused building. The golf course, including the old building, was leased by the defendant Commission from the Crown, subject to an earlier lease to the Club. The plaintiff sued for damages, alleging that his injury had been caused by the fall of a brick from the wall of the building.

Held, the action must fail as against both defendants, even assuming (what was not established by the evidence) that the plaintiff's injuries had been sustained in the manner alleged by him.

As to the Commission, apart from the fact that, as an agent of the Crown, it was not liable in tort, the plaintiff was only a licensee on the property. The only duty owed to a licensee was not to set a trap or expose him to a danger not obvious or to be expected. *Azzole v. W. H. Yates Construction Co. Ltd.* (1928), 61 O.L.R. 416; *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, applied. There was no evidence which would warrant a finding that there had been such a trap or concealed danger, and the plaintiff, having had a full opportunity of observing the old building, should have been as cognizant of the danger as the Commission.

As to the Club, the plaintiff, as a member, had a common interest in being on the premises, which gave him the status of an invitee. *Robert Addie and Sons (Collieries), Limited v. Dumbreck*, [1929] A.C. 358; *Parkinson v. Saint John Horticulture Association* (1932), 5 M.P.R. 89, applied. But the only duty to an invitee, as laid down in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274, was to use reasonable care to protect him from unusual danger of which the occupier knew or ought to have known, and there was no evidence that the Club knew or ought to have known of any such danger. If mere knowledge of the great age of the building was to be considered, then the plaintiff shared this knowledge, and there would be no duty to warn him of something of which he already knew. *Arnold v. Stothers & Gaby* (1910), 16 O.W.R. 234, referred to. An invitee must be taken to have voluntarily assumed the risk of a danger which was patent to everyone. *Lucy v. Bawden*, [1914] 2 K.B. 318, referred to. The circumstances were not such as to entitle the plaintiff to rely upon the principle of *res ipsa loquitur*. *Pritchard v. Peto et al.*, [1917] 2 K.B. 173, applied.

AN ACTION for damages. The facts are fully stated in the reasons for judgment.

1st March 1945. The action was tried by HOPE J. without a jury at St. Catharines.

J. L. G. Keogh, for the plaintiff.

J. W. Thompson, K.C., for the defendant Commission.

H. F. Upper, K.C., for the defendant Club.

9th April 1945. HOPE J.:—The plaintiff, who is thirty-one years of age, was a truck-driver and yard foreman in the employ of a local lumber company prior to the accident under review herein. In 1943, he became a playing member of the defendant golf club. Although his annual fees were only partially paid at the date in question, any default in payment of the balance cannot be considered as affecting his status. He was familiar with the golf course, having played it on several occasions prior to the 1943 season. On the morning of 22nd August 1943, at about 11 o'clock, he was playing the course as one of a foursome.

The defendant Commission is a body corporate, created by statute (now The Niagara Parks Act, R.S.O. 1937, c. 93). By virtue of a lease dated 6th December 1934, filed as Ex. 11, between the Crown in the right of the Dominion and the Commission, the latter occupies as tenant, for a term of ninety-nine years, certain parcels or tracts of ordnance land comprising the Fort Mississauga Reserve, *inter alia*, subject to certain covenants, stipulations, provisos and conditions of which only the following concern this action, *viz.*:

"8. The Lessees will continue the permission granted to the Niagara-on-the-Lake Golf Club for the use as a Golf Course of the Military Property adjoining Fort Mississauga, under the same terms and conditions as are contained and set out in an agreement between the Lessor and the said Golf Club, made the First day of May, 1924."

"13. The Lessees shall, during the continuance of this agreement, maintain the lands and premises hereby demised to the satisfaction of the Lessor."

It was conceded by all counsel that included in the lands demised by both of the leases mentioned is the old building known as Fort Mississauga, apparently now and for many years unoccupied.

The defendant Club is an incorporated body. The lease of 1st May 1924, between the Crown and the Club, subject to which the Commission holds the premises, provides, *inter alia*, that the property be not closed to the public generally; that

the Club will, during occupancy, keep the course cut, keep down noxious weeds, maintain tees, greens and fairway, all to the satisfaction of the district engineer of the lessor.

While the old fort is on the lands leased, I gather that neither of the defendants uses or exercises any jurisdiction over the fort.

The second green of the golf course lies between the south wall of the fort and the old moat which surrounds the fort. The edge of the green itself extends to within approximately six feet of the south wall.

This south wall is corbelled at the top with an outward brick structure gradually extending about a foot beyond the main outer surface of the wall. The plaintiff said that this projecting corbel was of wood, but, in the light of other evidence, I think he is mistaken.

Aside from the antiquity of the structure, which was of common knowledge, there was no evidence of any examination of the corbelled wall after the accident, which disclosed a dangerous, existent condition. Neither was there any evidence that any bricks or other parts had fallen previously or been known to have fallen previously, to the knowledge of the defendants or either of them.

On the day of the accident, the plaintiff, in his approach shot to the second green, overshot it. His ball lay in the rough about half way between the south wall of the fort and the edge of the green. As a right-handed player, he was "addressing" his ball to play it to the green when he received a sharp blow on the point of his left shoulder. The plaintiff at that time made no observation as to the object which hit him. It was not until he returned to the scene, at about 3.30 o'clock in the afternoon, that for the first time he saw the piece of brick with attached mortar which is filed herein as Ex. 1. No other brick or piece of brick was then lying on the ground in the vicinity.

One of the foursome, who was standing at the opposite side of the green at the time the plaintiff was struck, swore that he looked up just as the plaintiff was addressing his ball, and observed a dark object falling in the air about half the height of the fort wall. He did not identify the object which he saw as Ex. 1. The second of the foursome, who was called by the plaintiff, would not say that he saw any falling object strike the plaintiff. He did see the plaintiff grasp his shoulder.

The blow sustained by the plaintiff did not cause any bone fracture, but a severe blood contusion, which cleared normally, and also an apparent injury to the sensory and motor nerves of the arm resulting in some partial disability. The plaintiff was under the care of a physician for some period, as is evidenced by the doctor's account, Ex. 2, and the testimony of the physician. He was also unable to work for various intervals because of the disability to his arm—the particulars of loss of earnings are set out in Ex. 7. He has played golf a few times since the accident. While the plaintiff still claims pain and some disability in the use of his arm, the symptoms are apparently now subjective. The physician testified that he did not see much difference between the condition of the plaintiff now and his condition two or three years ago.

The plaintiff claims that he was on the premises as an invitee or licensee, and is entitled to be indemnified for the injury which he alleges was due to the negligence of either or both of the defendants.

The defendant The Niagara Parks Commission sets up three grounds of defence: firstly, that the Commission is an agent or servant of the Crown and as such no action in tort is maintainable against it; secondly, that the plaintiff was, with respect to this defendant, only a licensee, and hence on the facts of the case no liability exists; and lastly, that the plaintiff voluntarily accepted the premises for the purpose for which they were intended, and voluntarily assumed any risk in connection therewith.

Counsel for the plaintiff readily assented to the contention that the Crown is not answerable in an action for tort. But, relying on the judgment of the Judicial Committee of the Privy Council in *International Railway Company v. Niagara Parks Commission*, [1941] A.C. 328, [1941] 2 All E.R. 456, [1941] 3 D.L.R. 385, [1941] 2 W.W.R. 338, 53 C.R.T.C. 1, Mr. Keogh argued that this was not an action against the Crown or its agent but against a separate and distinct legal entity, and that there was no proof by this defendant that the Commission is the servant or agent of the Crown. On this point the Court was, however, referred to the terms of the Act of incorporation and in particular to ss. 9, 21 and 22. Further, Mr. Keogh argued that by entering an appearance the Commission had waived its

immunity to an action in tort. I can find no basis or authority for such last contention.

In *Peccin v. Lonagan and T. & N.O. Railway Commission*, [1934] O.R. 701, [1934] 4 D.L.R. 776, the defendant Commission was a body corporate created by statute and by virtue of The Interpretation Act, now R.S.O. 1937, c. 1, had power to sue and be sued. But the Court held that the liability to be sued did not destroy the old constitutional right of immunity of the Crown in respect of tortious acts of the Crown's servants, although Davis J.A. pointed out that it might be different in an action founded on contract.

In *Gooderham & Worts Ltd. v. Canadian Broadcasting Corporation*, [1940] O.R. 130 at 137, [1939] 4 D.L.R. 241, McTague J.A. said: "It seems pretty definitely established that the Crown or an emanation of the Crown cannot be successfully sued in tort except possibly in very exceptional circumstances, but that it can be sued in contract."

In a long line of other decisions, it has been held that apart from any statutory provision, and without the consent to the action from the Attorney-General on behalf of the Crown, no action in tort is maintainable against the Crown and that this immunity extends to an agent or servant of the Crown: *vide Graham v. Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O.R. 1; *Nadeau v. The Workmen's Compensation Board*, [1935] O.R. 472, [1935] 4 D.L.R. 442; *Mackenzie-Kennedy v. Air Council*, [1927] 2 K.B. 517; *Coyle et al. v. Black et al.* (1933), 7 M.P.R. 412; *The Quebec Liquor Commission v. Moore*, [1924] S.C.R. 540, [1924] 4 D.L.R. 901; *Moore v. The Federal District Commission and the City of Ottawa*, [1937] O.R. 200, [1937] 1 D.L.R. 461. In the first of the foregoing decisions cited, the defendant was indeed the statutory predecessor of the defendant Commission herein.

In *Howarth v. Electric Steel and Metals Co. Limited; Young v. Electric Steel and Metals Co. Limited* (1916), 35 O.L.R. 596, 29 D.L.R. 293, the *Graham* case, *supra*, was differentiated on the ground that the Attorney-General for Ontario had consented to the action in tort being brought against the Hydro-Electric Power Commission of Ontario which was added as a party defendant.

The case of *Rattenbury v. Land Settlement Board*, [1929] S.C.R. 52, [1929] 1 D.L.R. 242, cited by Mr. Keogh in support

of his contention, was not an action founded on tort. Similarly it seems very clear from the judgment of the Judicial Committee in the *International Railway Company* case, *supra*, that their Lordships, giving particular consideration to the terms of the contract in question therein and of the Acts of incorporation, were concerned solely with the contractual liability of the defendant therein, which is also the defendant Commission herein. Luxmoore L.J., at p. 341, said:

"The action is based on a contract made by the commission on its own behalf as well as on behalf and with the approval of the government of the province. The contract in this form was confirmed by the legislature (that is, by the Act of 1892), and is declared to be 'valid and binding on the parties thereto.' In their Lordships' view, the commissioners entered into the agreement of 1891 on the express terms that they were to be liable for its fulfilment, and it is, therefore, unnecessary to consider further the more difficult question which would have arisen if the words 'on their own behalf' had been omitted, for there is nothing to prevent an agent from entering into a contract on the basis that he is himself to be liable to perform it as well as his principal. The words in the agreement 'on their own behalf' are *prima facie* directed to separate liability when read in conjunction with the words that follow, namely, 'as well as on behalf of' the Crown. Kelly J. gave no weight to these words. . . . He [Kelly J.] went on to say that 'It is plain that the defendant commission has no other capacity than that of Crown agent or servant'. The Acts of Incorporation plainly constitute the commission as a corporation with a separate legal entity, and in some, at any rate, of its powers it was obviously recognized that it would have contractual capacity separate from the Crown."

Thus, I am of the opinion that the reasons of their Lordships clearly recognize that the Commission is an agent of the Crown, but that by statute and agreement it had impliedly, if not directly, rendered itself liable in contract. But I can find nothing in the judgment which goes beyond that—so as to vitiate the principle of the immunity of the Crown and its agent from liability in tort as propounded and well recognized in the cases earlier cited. Therefore, on this first ground of defence, I think the defendant Commission must succeed.

On the second plea in defence of the Commission, I would also hold against the plaintiff. In my opinion the plaintiff was, with respect to the Commission, only a licensee. It cannot be said that the plaintiff had such a common interest with the Commission in being upon the premises as to afford him the status of an invitee.

In *Azzole v. W. H. Yates Construction Co. Ltd.*, 61 O.L.R. 416, [1928] 1 D.L.R. 223, Hodgins J.A., quoting Lord Sumner in *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253 said: "A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances."

There is certainly no evidence in the case at bar which would warrant a finding that there was a trap or a hidden or concealed danger. Moreover, it appears to me that the plaintiff himself had full opportunity of observing and knowing the premises and the nature and antiquity of the old fort—and should have been as cognizant of any danger as was the Commission. This is assuming, of course, firstly that the plaintiff was hit by the brick in question, and secondly that the brick fell from the fort wall, of which I can find no concrete evidence.

As was stated by Pigot C.B. in *Sullivan v. Waters et al.* (1864), 14 I.C.L.R. 460 at 475 (quoted by Clute J. in *Bilton v. Mackenzie* (1914), 31 O.L.R. 585, 19 D.L.R. 633): "... a mere license, given by the owner, to enter and use premises which the licensee has full opportunity of inspecting, which contain no cancelled cause of mischief, and in which any existing source of danger is apparent, creates no ... obligation in the owner ... to guard the licensee against danger."

The principles set out in the cases of *Taylor v. The People's Loan and Savings Corporation*, [1930] S.C.R. 190, [1930] 2 D.L.R. 891, and *Graham v. Commissioners for Queen Victoria Niagara Falls Park*, *supra*, seem equally applicable to the facts here present, and support my opinion that there is no liability of the defendant Commission herein.

With respect to the liability of the defendant golf club, if any, it appears that the old fort is within the lands used by the Club under its lease. I do not think the Club can rely on the fact that the plaintiff was in partial default in the payment of

his annual fees, so as to claim successfully that he lacked membership at the time of the accident. Membership in the club must be considered as constituting such community between these two parties as to constitute the plaintiff an invitee, and I so find.

Viscount Dunedin, in *Robert Addie and Sons (Collieries), Limited v. Dumbreck*, [1929] A.C. 358, includes in the description of an invitee a person who is "on the land for some purpose in which he and the proprietor have a joint interest."

In *Parkinson v. Saint John Horticulture Association* (1932), 5 M.P.R. 89, a person patronizing a toboggan slide for amusement was held to be an invitee.

The rule of liability in the case of an invitee is as stated by Willes J. in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 at 288, viz.: "... we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

Let these principles be applied to the case at bar. The occupier owes a duty to use reasonable care to prevent damage from unusual danger of which he knows or ought to know. As earlier indicated, there was no evidence adduced by the plaintiff that the Club or any of its officials knew of the alleged danger, or that they ought to have known. No brick or object was known to have fallen previously, nor was there evidence indicating that the wall was in such a state of crumbling or disrepair, due to age or otherwise, as to warrant an assumption that the defendant Club ought to have known of the danger. Furthermore, it would appear to be clear from the words of Willes J. that the question whether the occupier took reasonable care by giving notice, guarding, or otherwise, does not arise unless and until there is some evidence of neglect on the part of the occupier before the Court. This latter is distinctly lacking.

If knowledge is to be imputed to the occupier (the defendant Club) purely from the fact that the fort was a building of great age, the knowledge of age alone should not, in my opinion,

be accepted as evidence of the existence of a dangerous condition. If it were to be, then it is a common knowledge, shared by the plaintiff himself. Hence, if the danger was equally common to the plaintiff and defendant, and was obvious to the plaintiff, there would be no duty cast upon the defendant to warn him of something which he knew existed: *vide Arnold v. Stothers & Gaby* (1910), 16 O.W.R. 234, 1 O.W.N. 829.

An invitee must be taken to have voluntarily assumed the risk of a danger which is patent to everyone: see *Lucy v. Barnden*, [1914] 2 K.B. 318.

By an amendment permitted at the opening of the trial, the plaintiff pleaded that the fall of the brick was in itself evidence of negligence on the part of either or both of the defendants, thus entitling him to rely on the principle of *res ipsa loquitur*.

With this contention I am unable to agree, and I find my opinion supported by the judgment of Bailhache J. in *Pritchard v. Peto et al.*, [1917] 2 K.B. 173, where in almost similar circumstances he rejected the argument of the plaintiff's counsel that the case was one of *res ipsa loquitur*. This latter case was one wherein the plaintiff went to a house owned and occupied by the defendant to collect money due to him from the defendant. While he was standing upon the doorstep a piece of projecting cornice from the top of the house fell on his head, and injured him. It was held that the plaintiff was not entitled to recover on the ground, *inter alia*, that the plaintiff had not shown that the defendant was aware, or ought to have been aware, of the decay of the cornice. The words of Bailhache J. also illustrate the application of the rule in *Indermaur v. Dames*, *supra*, and are particularly apt in the circumstances of the present case, *viz.* (at p. 176):

"The present case is correctly pleaded as one of negligence and not of nuisance, and, in considering whether the facts support that allegation, one has first to ascertain what duty Mrs. Peto owed to the plaintiff; for unless her duty can properly be stated in terms large enough to cover this case, she can be guilty of no breach of duty towards the plaintiff.

"I have come to the conclusion that the duty owed to the plaintiff was the same as the duty owed to the plaintiff in *Indermaur v. Dames*, and that, stated in terms applicable to

this case, Mrs. Peto's duty was to take reasonable care to keep her house in such a state of repair as not to expose the plaintiff to any hidden danger of which she was aware, or ought to have been aware

"Now in order to make Mrs. Peto liable, if I have correctly described her duty, it must be shown that she was aware, or ought to have been aware, of the decay of the cornice The plaintiff, if he desired to establish the fact that her ignorance was due to neglect of some reasonable precaution, should have given some evidence to show what precautions are usual and proper for occupiers of houses with projecting cornices to take, and that she failed to take them. This he made no attempt to do."

However unfortunate may have been the injury suffered by the plaintiff, I must conclude for the foregoing reasons that his action fails as against both defendants. The same is hereby dismissed with costs.

Should the plaintiff appeal and the foregoing conclusion as to liability not be sustained, it is desirable that I assess the damages.

Ex. 7 filed is a statement of the wages alleged to have been lost, owing to the disability, totalling \$1,889.90, and disbursements totalling \$127.30. The plaintiff no doubt also had certain pain and suffering. However, the loss of wages is not supported by any evidence, unless it be that the dates are more or less coincidental with those of the visits of the physician as appearing in Ex. 2.

I was not overly impressed with the plaintiff's evidence as to his disability. He gave me the impression that he was making the most of it. Therefore, in the circumstances I feel that if he were allowed damages of \$2,000 in all, it would be reasonable.

Action dismissed with costs.

Solicitors for the plaintiff: Bench, Keogh, Grass & Cavers, St. Catharines.

Solicitors for the defendant Commission: Hughes, Agar, Thompson & Amys, Toronto.

Solicitors for the defendant Club: Upper & Musgrove, Niagara Falls.

[COURT OF APPEAL.]

Re Sessional Allowances under The Legislative Assembly Act.

Constitutional Law—Legislative Assembly—Sessional Allowances of Members—Length of Session—Distinction between “session” and “sittings”—The Legislative Assembly Act, R.S.O. 1937, c. 12, ss. 70, 71.

The phrase “if the session extends beyond thirty days” in s. 70(1) of The Legislative Assembly Act, providing for sessional allowances to members, refers to the number of calendar days between the opening and the closing of the session, and not to the number of days on which the Legislature actually sits. Where, therefore, a session opened on 15th February and ended, by dissolution of the Assembly, on 24th March, *held*, the members were entitled to the full sessional allowance of \$2,000, since the session had extended beyond thirty days, notwithstanding that it had actually sat on only twenty-six days during the period.

A QUESTION referred to the Court of Appeal under The Constitutional Questions Act, R.S.O. 1937, c. 130. The question is set out in the reasons for judgment of HENDERSON J.A.

9th April 1945. The reference was heard by HENDERSON, LAIDLAW and MCRUER JJ.A.

C. R. Magone, K.C., for the Attorney-General: Other sections of The Legislative Assembly Act, R.S.O. 1937, c. 12, which should be read with s. 70(1), in order to ascertain its meaning are s. 4 (which is the same as s. 86 of The British North America Act), and ss. 31, 47 and 48. Reference may also be made to s. 13(1) of The Audit Act, R.S.O. 1937, c. 24, s. 3 of The Statutes Act, R.S.O. 1937, c. 2, and the title page of any volume of the annual statutes. The distinction between adjournment and prorogation is made clear in Bourinot's Parliamentary Procedure, 4th ed. 1916, p. 102, and May's Parliamentary Practice, 13th ed. 1924, p. 56. The power of adjournment is vested in the Assembly, while prorogation is a matter for the Lieutenant-Governor as representative of His Majesty. Once a session has been opened by the Lieutenant-Governor, it continues until prorogation.

The word “session” in all these sections refers to the whole period between opening and prorogation or dissolution. Here the session was opened on 15th February and ended, by dissolution of the Assembly, on 24th March. Section 70(1) has been substantially in its present form since 1869 (c. 3, s. 1), and no question appears ever to have been raised as to its interpretation. See Bourinot, *op. cit.*, p. 154. The wording of the section is deliberate, and it seems to contemplate that the

full indemnity shall be paid if the *session* extends beyond thirty days, whether or not there have been thirty days of sittings.

C. F. H. Carson, K.C., requested by the Court to argue the case in the interest of those opposed to the question being answered "\$2,000": The answer to this question depends upon the meaning to be given to the word "day" in s. 70(1). It is first used in the phrase "each day's attendance". There it clearly refers only to days on which the Assembly actually sits. The same meaning should be given to it when it reappears in the subsection, in the phrase "if the session extends beyond thirty days", which should be considered as meaning "thirty sitting days". As a general rule, a person whose compensation is fixed by the day is paid only for those days on which he works. A session that extends beyond thirty sitting days is considered a long one, and the Legislature has always thought that in the case of such a session there should be a lump sum, rather than a *per diem* allowance. [LAIDLAW J.A.: Can the word "days" be read as "sitting days" in s. 73?] That section deals with something different. [LAIDLAW J.A.: Surely the word would be used in the same sense in both places.] [HENDERSON J.A.: The question states the fact to be that the session opened on a given day, and ended on another; can we go behind that?] It may be that the question itself "begs the question", but I submit not.

Rule 1 of the Rules, Orders, etc. of the Legislative Assembly of Canada, 1860, the first Rules and Orders of the House of Commons after Confederation, Rule 2 of the present Rules of the House of Commons, and Rule 2 of the present Rules of the Legislative Assembly, are all similar, and all deal with "sitting days". The English Rule appears to be the same: see 24 Halsbury, 2nd ed. 1937, p. 238.

Section 71 of the Act has no application to the question here raised, but deals with an entirely different matter.

The legislation should be given a reasonable interpretation, and not one that would lead to an absurdity: *Attorney-General v. Morgan*, [1891] 1 Ch. 432 at 449; Craies on Statute Law, 3rd ed. 1923, p. 82. If a session opened on 15th December and adjourned on that day until 18th January (34 days later), on which day it was prorogued, could it be contended that the members would be entitled to an allowance of \$2,000 for two days' attendance?

Saturdays and Sundays are not regular sitting days, and by Rule 2 the House adjourns automatically from Friday until the following Monday. This Assembly did not adjourn "over the day" at any time during the session. See May, *op. cit.*, pp. 185, 186.

Even if the method prescribed by s. 71(1) for reckoning a "day of attendance" is to be applied in reckoning "each day's attendance", and for determining the meaning of "thirty days" in s. 70(1), there were not thirty such days during the session in question. The section of the Act as to deductions (now s. 71) remained in the same form from 1869 (c. 3, s. 2) to 1911, except for the dropping of the words "for the purposes of this Act" in 1908, c. 5, s. 69. The Act of 1911 (c. 3) has a section (68) the same as the present s. 70 (with a difference in amounts), but the old s. 69 is changed.

The only case I have been able to find which is at all similar is *Shaw v. Carter* (1931), 297 Pac. 273, in the Supreme Court of Oklahoma, where the Court held that the words "sixty days of such session" meant sixty legislative working days.

C. R. Magone, K.C., in reply: *Shaw v. Carter, supra*, shows that "sittings" was considered as meaning something different from "session". [HENDERSON J.A.: Does the question, as submitted to us, not answer itself?] All the facts are set out in the recitals of the Order-in-Council, and are part of the material before the Court. [McRUER J.A.: The real question for us is whether the session, which opened and closed on the dates set out, extended "beyond thirty days", within the meaning of s. 70(1)?] Precisely.

Cur. adv. vult.

18th April 1945. HENDERSON J.A.:—The Order-in-Council approved by the Honourable The Lieutenant-Governor and dated the 28th day of March A.D. 1945, is as follows:

"WHEREAS the Second Session of the Twenty-First Legislature of Ontario opened on the 15th day of February, 1945, and the Legislative Assembly was dissolved by Proclamation of the Honourable the Lieutenant-Governor on the 24th day of March, 1945, having in the interim between the said two dates held sittings on 26 days, no Committee of the said Assembly having held sittings on any date upon which the Assembly did not sit.

"The Honourable the Attorney-General, therefore, recommends pursuant to the provisions of The Constitutional Questions Act, R.S.O. 1937, Chapter 130 that the following question be referred to the Court of Appeal for Ontario for hearing and consideration:

"1. What is the amount of the sessional allowance payable to a Member of the Legislative Assembly who attended the Session of the Assembly which commenced on the 15th day of February, 1945 and ended on the 24th day of March, 1945 pursuant to the Legislative Assembly Act, R.S.O. 1937, Chapter 12, Section 70, subsection 1 and who was not absent from such sittings for more than six days as provided by the said Act, Section 71, subsection 2.

"The Committee of Council concur in the recommendation of the Honourable the Attorney-General, and advise that the same be acted on."

The relevant sections of The Legislative Assembly Act, R.S.O. 1937, c. 12, are as follows:

"70.—(1) In every session of the Assembly there shall be allowed to each member attending the session \$20 for each day's attendance, if the session does not extend beyond thirty days, and if the session extends beyond thirty days, then there shall be payable to each member attending such session a sessional allowance of \$2,000.

"(2) To the member elected as chairman of the Committee of the Whole House there shall be payable in every session, in addition to the amount set out in subsection 1, an additional amount of \$1,000.

"71.—(1) A deduction at the rate of \$15 per day shall be made from his sessional allowance for every day on which a member does not attend sittings of the Assembly, or of some committee thereof in case the Assembly sits on such days, but each day during the session, after the first on which the member attends on which there has been no sittings of the Assembly, in consequence of its having adjourned over the day or on which the member is travelling *bona fide* on his way to the place where the session is held, for the purpose of attending a sittings of the Assembly or on which the member was in the place where the session was held, or within ten miles thereof, but was prevented by sickness from attending the sittings shall be reckoned as a day of attendance at the session.

"(2) No deduction shall be made for or on account of the necessary absence of a member, so long as such absence does not exceed six days during the session."

In my opinion there is only one possible answer to the question as put, and that answer is found in the question itself.

The question states that the session in question commenced on the 15th day of February 1945 and ended on the 24th day of March 1945, and that no deductions from the sessional allowance are to be made on account of absence. This is a statement of fact we are bound by and furnishes the answer. It is noteworthy that the question relates to the "session", and it is only in respect of the question of absence that the word "sittings" is used in the question.

As I have said, if we are to base our answer on the question itself, then, with respect, I am of opinion that the answer is \$2,000.

It will be observed that in its preamble the Order-in-Council, in addition to quoting the date on which the session opened and the date on which the Assembly was dissolved, states that in the interim between the said two dates sittings were held on 26 days, and no committee of the Assembly held sittings on any date upon which the Assembly did not sit. Does this carry the matter any further? I think not. The statement still stands that the session began on the 15th day of February 1945 and ended on the 24th day of March 1945, and between those dates—a period of 38 days—we were told in argument that the practice of the House is to sit from Mondays to Fridays inclusive and that the House adjourned as a matter of course from Friday night till Monday morning. I assume that the statement in the preamble to the Order-in-Council that the House actually sat during the period of 26 days is made up of the days in the period excluding Saturdays and Sundays. See Rule 2 of the Rules of the Legislative Assembly, 1939, set out in Lewis, Parliamentary Procedure in Ontario, 1940, at p. 103:

"2. The time for the ordinary meeting of the House is at three o'clock in the afternoon of each sitting day; and if at that hour there be not a Quorum the Speaker may take the Chair and adjourn. When the House rises on Friday it shall stand adjourned, unless otherwise ordered, until the following Monday."

The members of the Legislature come from all parts of the Province and are assumed to be in attendance during the session and not only during the days on which sittings are held. This is necessarily so in the case of those who have long distances to travel and who are therefore necessarily in Toronto during week-ends or at least many of them.

In this connection reference may be had to subs. 1 of s. 71 of the statute hereinbefore set out.

It will be seen that this section provides for deductions for days on which a member does not attend sittings of the Assembly or of some committee thereof, but only in case the Assembly sits on such days, and provides that except in this instance the days covered by adjournments are to be reckoned as a day of attendance at the session.

This, in my view, confirms the interpretation placed on s. 70, subs. 1.

Laidlaw J.A.:—The question referred to this Court, pursuant to the provisions of The Constitutional Questions Act, R.S.O. 1937, c. 130, together with the Order-in-Council dated 28th March 1945, and relevant sections of The Legislative Assembly Act, R.S.O. 1937, c. 12, are reproduced in the reasons for judgment of my brother Henderson. I agree with his opinion that "there is only one possible answer to the question as put, and that answer is found in the question itself." That answer is \$2,000, and there is no alternative answer open to the Court if our consideration be confined to the form of the question as submitted. Generally, the Court should not presume to alter a question referred to it for hearing and consideration, and should not undertake to give an answer to a question in different form. But in this instance there can be no doubt as to the real question to which an answer is sought. It is this, "Did the second session of the twenty-first Legislature of Ontario, which opened on the 15th day of February 1945, extend beyond thirty days, within the meaning and provision of s. 70(1) of The Legislative Assembly Act, R.S.O. 1937, c. 12, the Legislative Assembly having been dissolved by proclamation of the Honourable the Lieutenant-Governor on the 24th day of March 1945, and in the interim between the said two dates having held sittings on twenty-six days, no committee of the said Assembly having held sittings on any date upon which the Assembly did

not sit?" Stated in this form, my answer to the question is "Yes." The reasons for my answer follow.

The language used in s. 70(1) of The Legislative Assembly Act is free from ambiguity. The words, read in their literal and popular sense, leave no room for uncertainty or doubt as to the meaning of the section. There is no occasion to resort to any rule of construction to ascertain the meaning of the provision. The words "thirty days" as used in the section mean thirty calendar days. If it had been intended by the Legislature that any other meaning should be given to those words, or that their ordinary meaning should be cut down, it would have been so provided. In the absence of such provision it would be quite improper to attach a secondary meaning to the simple, plainly understood word "days". It cannot reasonably be read as meaning only "days upon which there could be attendance" or "regular sittings days", as argued by counsel on behalf of those opposed to the question (in the form submitted) being answered "\$2,000." Such a meaning would be forced, artificial and unjustified.

The word "session" is used throughout the statute in obvious contrast and distinction to the word "sittings", and the allowance to each member, as provided by s. 70(1), is for attending the "session". The session continues, without interruption, on days when there are no sittings, and a member may continue in attendance at the session on all days, whether there be sittings or not. Moreover, the allowance provided by the statute is "indemnity to members", as appears from the heading of the section under consideration. That indemnity is not intended to be limited to the sitting days of the Assembly, but, on the contrary, extends to all days during which a member may require protection or exemption from loss or damage. That protection or exemption is intended to extend to every calendar day of the session. Thus, members who are absent from their homes and incur expense by remaining at the place of the session during weekends and other days on which there are no sittings of the Assembly, or a committee, are properly secured.

It follows from my answer "Yes" to the question stated by me in revised form that, by virtue of the provision in s. 70(1), there shall be payable to each member attending the session under consideration a sessional allowance of \$2,000. Thus, the

same result is obtained as is found in the question itself in the form referred to the Court.

MCRUER J.A.:—In my view the word “session”, as used in s. 70(1) of The Legislative Assembly Act, R.S.O. 1937, c. 12, and in other relevant sections, connotes the period of time during which members of the Legislature are called together for the despatch of public business. The session in question, having commenced on 15th February 1945 and concluded on 24th March 1945, was, therefore, a session that extended beyond thirty days. I can find nothing in the legislation that would warrant the Court in concluding that the words “thirty days” should be taken to mean “thirty days on which the Legislature actually sat.”

I am, therefore, of the opinion that the answer to the question should be “\$2,000.”

Answer accordingly.

Solicitor for the Attorney-General: C. R. Magone, Toronto.

[COURT OF APPEAL.]

Rex v. Johns.

Criminal Law—Speedy Trials of Indictable Offences—Joinder of Counts—Separate Informations and Committals for Trial—The Criminal Code, R.S.C. 1927, c. 36, ss. 827(3) and 839, as re-enacted by 1943, c. 23, ss. 25 and 27; ss. 825, 827, 834, 856.

Notwithstanding the 1943 amendments to Part XVIII of The Criminal Code, it is still not permissible for the Crown to join, in the formal statement in writing of the charge, several counts charging different offences, where those offences were originally charged in separate informations, and were made the basis of separate preliminary hearings and committals for trial. *Rex v. Balciunas*, [1943] S.C.R. 317, is still the law despite the amendments. *Rex v. Deur et al.*, [1944] S.C.R. 435, considered. The re-enactment of s. 839 does not make s. 856 (which is in Part XIX) applicable to speedy trials under Part XVIII, since Part XIX is made applicable only in so far as its provisions “are relevant and not inconsistent with the provisions of this Part”, and s. 856 is inconsistent with several sections of Part XVIII.

AN APPEAL from conviction. The following statement of facts is taken from the judgment of ROACH J.A.:

This is an appeal by the accused from his conviction and sentence by His Honour Judge Macdonell in the County Court Judges’ Criminal Court at Toronto on two charges:

First: That the accused “at the City of Toronto in the County of York on or about the 26th day of August in the year

1944, was found having in his possession, by night, without lawful excuse, an instrument of housebreaking, vault-breaking or safebreaking, to wit, a jimmy, contrary to the Criminal Code". Second: That the accused at the City of Toronto aforesaid "in the month of October in the year 1944, unlawfully attempted to break and enter the dwelling house of William Duckworth at number 263 Brock Avenue in the said city, with intent to commit an indictable offence therein, to wit, theft, contrary to the Criminal Code."

The accused was sentenced to the penitentiary for a term of three years on each charge, the sentences to run concurrently.

The first charge was laid by the information and complaint of one Walter Scott, sworn on 28th August 1944. On that charge the accused elected in the magistrate's court on 5th September to be tried at the next court of competent jurisdiction. Evidence was taken and he was committed for trial and was released on bail.

The second charge was laid by the information and complaint of one William Hill, sworn on 3rd October 1944. On that charge the accused elected in the magistrate's court on 11th October to be tried at the next court of competent jurisdiction. Evidence was taken and he was committed for trial.

On 13th October the accused appeared before His Honour Judge Parker, at the city of Toronto, and *on the second charge* elected to be tried by a judge without a jury, pleaded not guilty, and was admitted to bail.

On 30th October the accused, represented by counsel, appeared before His Honour Judge Macdonell presiding in the County Judges' Criminal Court. It is of importance that up to that time the accused had not elected to be tried by a judge without a jury *on the first charge*.

The accused had apparently been previously notified that his trial on the second charge would proceed on that date.

There was some preliminary discussion concerning the possible postponement of that trial. That part of the record is confusing, but this much of it is certain and definite: Counsel for the Crown referred to the date upon which the notice had been given to the accused as to the date of trial, which prompted the Court to say "That is the day they had all the elections", and the accused, at once, replied: "I have not had any election." The accused obviously was referring to the first charge.

After some further discussion concerning adjournment of the trial, counsel for the accused intimated that he might be able to have certain witnesses who were not then present available after the noon recess. The Court then adjourned for the noon recess and on resuming the following occurred: the Court read the two charges to the accused and then stated to him:

"On these two charges you have the right to be tried by me forthwith without the intervention of a jury, or to remain in custody or under bail as the Court may decide, to be tried in the ordinary way by the next Court having criminal jurisdiction. How do you wish to be tried, by me or by a jury?"

Counsel for the accused replied: "By a judge without a jury." The accused then pleaded not guilty and the trial proceeded.

The Crown submitted its evidence on the first charge and then on the second charge, at the conclusion of which the accused gave evidence on both charges, and was cross-examined by Crown counsel on both charges. He also called a witness on the second charge. The trial judge then found him guilty on both charges.

12th February 1945. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and ROACH JJ.A.

Vera L. Parsons, K.C., for the accused, appellant: The proceedings below are a nullity because two distinct charges, based on separate informations and committals for trial, were tried together. The charges should not have been joined in the formal statement in writing, nor should they have been tried together, since they are quite distinct and unconnected.

Rex v. Longo, [1941] O.R. 120, 76 C.C.C. 142, [1941] 3 D.L.R. 211, and *Rex v. Balciunas*, [1942] O.W.N. 503, 78 C.C.C. 255, [1942] 4 D.L.R. 511, affirmed [1943] S.C.R. 317, 79 C.C.C. 285, [1943] 2 D.L.R. 479, established, before the 1943 amendments to Part XVIII of The Criminal Code, R.S.C. 1927, c. 36, that there could be no joinder of charges in such circumstances. Sections 827(3) and 839, as re-enacted by 1943, c. 23, ss. 25, 27, do not make it permissible. The change in s. 827(3) from "charge" to "charge or charges" cannot be meant to refer to charges contained in separate informations; it must contemplate different charges in one information. [ROBERTSON C.J.O.: But even before the amendment charges could be joined if they were

originally embodied in the same information.] Yes, under the authority of *Rex v. Deur et al.*, [1944] S.C.R. 435, 82 C.C.C. 289, [1945] 1 D.L.R. 187. That case does not affect the question here raised, because here the charges were originally embodied in separate informations.

The new s. 839 does not make s. 856 applicable to speedy trials: *Rex v. Deur et al.*, *supra*, at p. 295 (C.C.C.). In *Marchand v. The King*, [1944] R.L. 269, 82 C.C.C. 138, there are references to s. 856 and to the amendment of s. 839, but they are *obiter*, and two of the judges take opposite views. [ROBERTSON C.J.O.: Those remarks refer rather to trying the charges together than to including them in the same charge sheet. It might be that s. 856 would be inapplicable, for various reasons, to proceedings under Part XVIII, while s. 857 might apply—in other words, if the counts are properly joined, that s. 857 would enable the judge to try them together.]

Charges arising out of separate informations are separate and distinct, just as two indictments are separate and distinct; s. 2(17) defines "indictment" as including an information.

Section 834 is wholly inapplicable, because it refers only to charges on which the accused has not been committed for trial.

The election before Macdonell Co. Ct. J. was invalid because the accused was asked whether he wished to be tried "by me"; there was no election on the first charge to be tried by "a judge": *In re Rex v. McDougall* (1904), 8 O.L.R. 30, 8 C.C.C. 234; *Rex v. Stewart* (1909), 43 N.S.R. 353, 15 C.C.C. 331, 6 E.L.R. 564; *Rex v. Guay* (1914), 21 R. de Jur. 253, 23 C.C.C. 243, 19 D.L.R. 820. Apart from the defect in stating the charges, the trials of the two charges were mixed, in violation of common law rules. The trial judge did in fact become confused as to the evidence referable to each of the two cases. [ROBERTSON C.J.O.: Is it not within the discretion of the trial judge whether or not to order separate trials?] Yes, but the exercise of that discretion can be reviewed, and here it should not have been exercised in favour of the joint trial: *Reg. v. McBerney* (1897), 29 N.S.R. 327, 3 C.C.C. 339; *Rex v. King*, 14 Alta. L.R. 481, [1919] 2 W.W.R. 877, 31 C.C.C. 297, 47 D.L.R. 410. [ROBERTSON C.J.O.: These charges were so totally distinct that it is hard to see how there could have been any confusion; the trial judge kept them quite distinct in giving judgment.] The principle, established in the cases, is founded on natural justice: *Reg. v. Fry et al.*; *Ex parte Masters* (1898), 78 L.T. 716.

The accused requested an adjournment on count 1, because he was not ready, but it was refused. The accused was thus not given an opportunity to make his full answer and defence: *Rex v. Picariello*, 18 Alta. L.R. 338, [1922] 2 W.W.R. 872, 37 C.C.C. 284, 68 D.L.R. 574; *Rex v. Lorenzo* (1909), 14 O.W.R. 1038, 1 O.W.N. 179, 16 C.C.C. 19; *Rex v. Chow Chin* (1921), 29 B.C.R. 445, 34 C.C.C. 228, 57 D.L.R. 708.

The trial judge misdirected himself as to the accused's defence on count 2. He says that the explanation is "unconvincing". This incorrectly places the onus on the accused: *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 at 481. The accused's explanation is quite consistent with the Crown's case.

W. B. Common, K.C., for the Crown, respondent: As to count 1, the onus was on the accused to notify the sheriff of his desire to elect: *Rex v. Mack*, 13 M.P.R. 578, 71 C.C.C. 257 at 262, [1939] 1 D.L.R. 663. What the trial judge said was a strict compliance with s. 827(3) as amended, which refers to a consent to be tried "by him".

The amendment of s. 827(3) creates an entirely new procedure, and renders *Rex v. Balciunas, supra*; *Rex v. Deur et al., supra*, and *Marchand v. The King, supra*, wholly obsolete. The definition of "indictment" in s. 2(17) was not amended, and although that definition still includes an information, it does not include the formal statement in writing provided for by s. 827(3). Before the amendment no formal statement of the charge need have been prepared at all. It is now immaterial whether the charges are based on a single information or on several. There is no reference in the amended subsection to the information or informations; it is "the charge or charges . . . for which he has been committed for trial".

While a separate election on each count may be desirable, it is nevertheless a sufficient compliance with the statute if, as was done here, both charges are read and the accused then elects; he has no legal right to elect on each charge separately.

There is no provision in Part XVIII requiring two appearances before the County Judge. Section 833 clearly shows that the trial may follow immediately after the election. No matter what had taken place before, the election before Macdonell Co. Ct. J. was sufficient, and he thereby acquired jurisdiction. [ROACH

J.A.: The accused had already elected on count 2. Surely the election before Judge Macdonell should be considered as an election on count 1]. Yes. If the Court holds that there was an insufficient election on count 1, the whole charge sheet would not thereby be vitiated, and the conviction on count 2 should stand.

Jurisdiction under Part XVIII is vested in the Court, not in a judge: s. 824. It therefore does not matter what member of that Court takes the election.

There was no real confusion in the trial judge's mind between the two charges. There was a momentary confusion at one point, but that was corrected, and his reasons for judgment show a clear separation.

The refusal of an adjournment should not be ground for interference. The accused was represented by experienced counsel, who did not press for an adjournment. A full answer and defence was made, and there was no failure by the trial judge to direct himself properly.

Vera L. Parsons, K.C., in reply: *Rex v. Mack, supra*, is not applicable, because there the accused was not tried under Part XVIII.

The 1943 amendments did not introduce a new procedure, except by pluralizing the word "charge". The "formal statement in writing" does not differ in essence from the old procedure of preferring a charge.

Cur. adv. vult.

26th April 1945. ROBERTSON C.J.O.:—I have had the privilege of reading the reasons for judgment of Mr. Justice Roach. I agree in the result reached by him, and, in the main, I agree with his reasons.

I have some doubt as to the conclusion reached by my brother Roach with respect to the election made before Judge Macdonell. I doubt whether it was a valid election. I do not think an opportunity was then given to elect upon one charge alone. It seems to me that Judge Macdonell quite definitely required the appellant to elect the one method of trial for both charges. In fact he made it plain that if the election was for a speedy trial he intended to try both charges together, and at the sitting which he was then holding, unless he, in his discretion, should decide otherwise. In my opinion the appellant was entitled to

make an independent election in respect of the charge upon which he had been first committed, but in respect of which he had not theretofore made his election, disregarding any election he might have made, or might then make, as to his trial on the second charge.

As to the more general, and more important, question of the effect of the amendments made to Part XVIII of The Criminal Code in 1943, that is the new subss. 3, 4 and 5 of s. 827 and the substituted s. 839, I agree with the reasons of my brother Roach. It is, I think, an opinion somewhat generally held, or an assumption somewhat generally made, without any critical examination of these amendments, that the substituted s. 839 has the effect of making s. 856 in Part XIX of the Code applicable to speedy trial procedure under Part XVIII. Section 856 deals with indictments and provides that "Any number of counts for any offences whatever may be joined in the same indictment", subject only to a proviso against joining with a count charging murder a count charging any other offence. Making this assumption, the amendments made in s. 827 are regarded as mere machinery for implementing this extended jurisdiction, to which the speedy trials procedure is assumed to be made applicable. It is plainly impossible, however, to give to the substituted s. 839 any such effect, and counsel for the Crown on the argument of this appeal made no such contention. My brother Roach has given reasons that, in my opinion, are conclusive on that matter and I desire to add only one observation on that point. If when Parliament in 1943 was amending Part XVIII of The Criminal Code it intended to make s. 856 apply, *mutatis mutandis*, to Part XVIII so that "any number of counts for any offences whatever" might be joined in the formal statement in writing provided for by the amended subs. 3 of s. 827, Parliament would not at the same time so expressly have defined and restricted, by that subsection, the charges that may be set forth in the formal statement for which it provides. The extended jurisdiction that s. 856 would give if applied to speedy trial procedure under Part XVIII is not only inconsistent with s. 825 and with s. 834, as my brother Roach has pointed out, it is inconsistent with subs. 3 of s. 827 as amended at the same time as the substituted s. 839 was enacted.

As I have said, counsel for the Crown made no contention that s. 856 has been made applicable to Part XVIII. His con-

tention was that, under subs. 3 of s. 827 as amended, the formal statement in writing, that it provides for, may contain as separate counts any charge or charges against the prisoner for which he has been committed for trial, including with the charge or charges for which he has been committed for trial as referred to in subs. 1 of s. 827 any other charge or charges for which the prisoner has been committed for trial in other proceedings taken upon any one or more other informations. In the present case, for example, the charges included in the formal statement in writing were laid by two separate informations. They are for two unrelated offences, and the prisoner was committed for trial by two different magistrates at different times. Counsel did not state in his argument any limits as to either time or place for the separate proceedings, the charges in which could be joined for the purposes of a speedy trial, according to his contention. In fact it would appear that if the words "charge or charges against him for which he has been committed for trial" are not to be confined to the charge or charges for which the prisoner has been committed for trial in one proceeding upon one single information, then it is difficult to see that any charges upon which he has been committed for trial anywhere in the Province, and upon which he has not been tried, can be excluded from the formal statement in writing provided for in subs. 3 of s. 827.

Now the words in the amended subs. 3 of s. 827, upon which so important an extension of jurisdiction is sought to be rested, differ but slightly from the words of the subsection as it stood when *Rex v. Balciunas*, [1943] S.C.R. 317, 79 C.C.C. 285, [1943] 2 D.L.R. 479, was decided. The words then were "the charge against him for which he has been committed for trial" while now they are "the charge or charges against him for which he has been committed for trial." The only change is the insertion of the words "or charges". This is a change appropriate to the practice of including more than one charge in the same information, a practice recognized and approved in *Rex v. Deur et al.*, [1944] S.C.R. 435, 82 C.C.C. 289, [1945] 1 D.L.R. 187, and which I believe has prevailed for a long time in some of the Provinces, if not in Ontario. No change whatever has been made in the words "for which he has been committed for trial", and these are the words still used in the subsection, as they were used when the *Balciunas* and *Deur* cases were decided,

to define the charge or charges that may be proceeded upon. There is nothing to indicate that as to these words Parliament intended to change their meaning. Upon ordinary principles of construction the words still mean what similar words mean elsewhere in a similar context in this Part of the Code.

Whatever importance is to be given to considerations such as saving time and expense at speedy trials, the introduction of such a practice as was adopted in the present case curtails the freedom of election that a prisoner has heretofore enjoyed in a manner that requires the clear authority of Parliament and that authority, I think, is not to be found in the amendments made in 1943 to Part XVIII of The Criminal Code.

GILLANDERS J.A. agrees with ROBERTSON C.J.O.

ROACH J.A. [after stating the facts as above]:—On this appeal counsel for the appellant has raised two objections to the procedure followed:

First: that there was no proper election by the accused for a speedy trial under Part XVIII of The Criminal Code, R.S.C. 1927, c. 36, on the first charge, and second: that there was no legal and valid conviction and sentence on either charge because each charge was commenced by a separate information and therefore they could not be tried together.

Dealing now with the first of those objections: The first charge is laid under s. 464(a) of The Criminal Code. It is triable under Part XVIII. What are the successive steps in the procedure, which gives the County Judge presiding in the County Court Judges' Criminal Court jurisdiction under Part XVIII? If in gaol, the accused is brought before the judge pursuant to the direction in s. 826. If on bail, he may notify the sheriff that he desires to make his election under Part XVIII, whereupon the sheriff shall notify the judge and the judge shall fix the time and place for making his election; the sheriff shall then notify the accused thereof, and the accused shall attend at that time and place for the purpose of making his election (s. 825, subss. 6 and 7).

Here the accused was on bail on both charges. He had already elected on the second charge. He did not notify the sheriff that he wanted to elect on the first charge. He appeared before Judge Macdonell, apparently as the result of a notice that on that date he would be tried on the second charge. The

accused having thus appeared before the judge, if he then and there made a proper election the mere fact that he had not previously notified the sheriff did not vitiate his election. It has been held by the Court of Appeal for British Columbia that where an accused person who is out on bail after committal for trial voluntarily appears at a County Court Judge's Criminal Court and there elects a speedy trial without a jury, such election may be accepted even though the accused was not brought in by the sheriff for election, nor was any written notice given to the judge by the sheriff: See *Rex v. Day* (1911), 16 B.C.R. 323, 20 C.C.C. 325.

The procedure, on the appearance of the accused before the judge for the purpose of election, is prescribed by s. 827, as follows: "The judge, having first obtained the depositions on which the prisoner was so committed, if any, or the prosecuting officer, as the case may be, shall state to the prisoner (a) that he is charged with the offence, describing it; (b) that he has the option to be tried forthwith before a judge without the intervention of a jury, or to remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction."

When an accused who has been committed for trial appears before the County Judge for the purpose of electing under s. 827, and elects to be tried by a judge without a jury, then and then only does a judge acquire jurisdiction to try him. It may be the judge before whom he elected or any judge having concurrent jurisdiction.

Here the accused had already so elected on the second charge, and the judge, therefore, had jurisdiction to try him on that charge. There was no reason for taking his election on that charge again. Just why the learned judge said to him, "On these *two charges* you have the right to be tried *by me* forthwith", etc., I am unable to understand. It is urged that these words convey the meaning, either expressly or by implication, that the accused had only one right of election, and that such election would apply to the two charges. Standing by themselves they undoubtedly could be so interpreted, but in the circumstances here existing I do not think it possible that they could be so understood by the accused. He was represented by experienced counsel and I think, despite the unfortunate language

used by the judge, he made it perfectly plain that on each charge he wished to be tried by a judge without a jury.

It is further argued that by virtue of the judge's language the election was not a general one, but an election to be tried by the particular judge before whom the accused then stood. In support of that argument the case of *In re Rex v. McDougall* (1904), 8 O.L.R. 30, 8 C.C.C. 234 is cited. The report of that decision does not indicate what was stated to the accused when he appeared for election, but it does state that the accused consented "to be now tried . . . by the said Judge without a jury", Anglin J., at p. 32, says: "This, I think, must be read as a consent to trial by the particular Judge who then presided, and in my opinion that fact vitiates the election." That case is distinguishable from the case at bar. Here, despite the judge's words, the accused made a general election to be tried "by a judge without a jury."

While I think that effect should not be given to the argument of counsel concerning election, I desire to make it plain that my rejection of that argument is based on the special circumstances of this case and is not to be taken as an approval of the procedure here adopted.

Could the charges be tried together in view of the fact that they were commenced by two separate informations? The answer to that question depends upon the effect to be given to s. 827 and s. 839 as amended by 1943, c. 23, ss. 25, 27.

Before quoting those amendments, it may be well to quote s. 827(3) as it stood prior to that amendment. The applicable part reads as follows: "(3) . . . or if the prisoner has been brought before the judge and consents to be tried by him without a jury, the prosecuting officer shall prefer the charge against him for which he has been committed for trial, or any charge founded on the facts or evidence disclosed in the depositions, and if, upon being arraigned upon the charge, the prisoner pleads guilty, the prosecuting officer shall draw up a record as nearly as may be in form 60." Section 833, which has not been amended, is as follows: "If the prisoner upon being arraigned under this Part consents as aforesaid and pleads not guilty the judge shall appoint an early day, or the same day, for his trial" (I omit the part not of importance in this case) "and the judge may proceed to try such prisoner, and if he be found guilty sentence as aforesaid shall be passed upon him."

While s. 827(3) stood as above quoted there were two cases which came before this Court and to which reference should be made. The first of these was *Rex v. Longo*, [1941] O.R. 120, 76 C.C.C. 142, [1941] 3 D.L.R. 211. That was a case in which the appellant with five others was tried on three charges of conspiracy. A separate information had been laid in respect of each charge, and, the accused having elected speedy trial, a separate charge sheet for each charge was prepared for the purposes of the record at the trial. By agreement between counsel for the Crown and for the accused, all three charges were tried together, the evidence adduced being made applicable to all three charges. The appellant was convicted and on an appeal by him to this Court it was held that "After arraignment and a plea of not guilty the trial is to proceed under sec. 833. It contains no provision for the trial of two charges together that, up to that time, have been separate, whether they arise wholly or in part from the same facts, or whether they do not", and that "there is no control left in the hands of the trial Judge to be exercised at his discretion during the course of the trial, as provided by sec. 858 in the case of several counts in one indictment."

The next case was *Rex v. Balciunas*, [1942] O.W.N. 503, 78 C.C.C. 255, [1942] 4 D.L.R. 511, affirmed by the Supreme Court of Canada, [1943] S.C.R. 317, 79 C.C.C. 285, [1943] 2 D.L.R. 479. In that case there were two separate informations, on each of which the accused was committed for trial. The accused having elected speedy trial under Part XVIII of The Criminal Code, the charges contained in the informations were set forth in a single charge sheet and there was one trial on all the charges. This Court held that this mode of trial was unauthorized because there was no provision in Part XVIII similar to s. 856 in Part XIX and that s. 856 was not applicable to speedy trials under Part XVIII. In confirming the judgment of this Court the Supreme Court of Canada said, at p. 319: "This may incur what may seem to be unnecessary expense in many cases, but the only remedy, in our opinion, is by way of amendment to the Criminal Code." That case was followed in the Supreme Court of Canada by the case of *Rex v. Dewar et al.*, [1944] S.C.R. 435, 82 C.C.C. 289, [1945] 1 D.L.R. 187. That was an appeal from the judgment of the Court of King's

Bench (Appeal Side), Province of Quebec. In that case the accused had been tried and convicted under Part XVIII on three charges of conspiracy. The proceedings had been initiated by a single information which contained all three charges. They were subsequently set forth in a single charge sheet and there had been one trial on all three charges. The Court of King's Bench (Appeal Side), having misinterpreted the judgment in the *Balciunas* case, quashed the conviction and directed a new trial. The Supreme Court of Canada, in allowing the appeal, pointed out, at p. 440, that what had been condemned in the *Balciunas* case was "the joinder for trial purposes of charges originating in different complaints, or different informations, the joinder of separate records, or, in short, of different cases." Rand J., referring to the judgment of this Court and to the judgment of the Supreme Court of Canada in the *Balciunas* case, said: "These judgments imply that, if the three charges had been properly on the charge sheet, they could have been tried together, and this is clearly the assumption underlying section 856 in relation to an indictment."

Section 827(3) as amended in 1943, reads as follows: ". . . or if the prisoner has been brought before the judge and consents to be tried by him without a jury, the prosecuting officer shall prefer a formal statement in writing, setting forth as separate counts therein the charge or charges against him for which he has been committed for trial and any charge or charges founded on the facts or evidence disclosed in the depositions and any charge or charges preferred against him pursuant to the provisions of section eight hundred and thirty-four."

Counsel for the appellant contends that s. 827(3), even as amended, does not authorize the joinder in the formal statement in writing of two or more charges which have been commenced by separate informations.

After most anxious consideration, I have concluded that effect should be given to that contention. If the successive steps provided for in s. 827 are considered in their chronological order, the true effect of the whole section as amended becomes the more apparent. What are they?

First: The judge, "*having first obtained the depositions on which the prisoner was so committed, if any,*" shall take the prisoner's election. The depositions there referred to surely mean the depositions given at a preliminary hearing before the

magistrate on a charge or charges set forth in a single information, and do not mean the depositions given at several preliminary hearings on several informations. That interpretation was necessary to the decision in the *Balciunas* case.

Second: If the prisoner elects speedy trial, then the formal statement in writing is to be preferred and it shall contain, as separate counts: (1) The charges for which he has been committed for trial; this must mean the charges for which he has been committed for trial as a result of those depositions. (2) Any charge or charges upon which he has not been committed for trial as a result of those depositions but which are founded on the facts or evidence disclosed in those depositions. (3) Any charge or charges preferred under s. 834.

The formal statement in writing having been preferred after these successive steps, it follows that it could only contain the charge or charges set forth in a single information.

Section 827(3) as amended differs from that subsection as it stood prior to amendment in four particulars only: (a) what had formerly come to be known as a charge sheet is now described as a formal statement in writing; (b) it requires the charge or charges that are to be contained in the formal statement in writing to be set out as "separate counts", and it thereby adopts some of the language in s. 856 (which is in Part XIX), which provides that more than one "count" may be joined in an indictment; in reality this is merely a change in nomenclature and not a change in substance; (c) it adds the plural to the singular of "charge" but, and this is significant, it does not expressly or by inference extend that plurality to include charges emanating from separate informations; (d) it, to some extent, clarifies the procedure where additional charges are laid under s. 834.

As amended, s. 827(3) is appropriate to and fits in with the decision in the *Deur* case in that it enumerates with particularity the charges which may properly be included in the formal statement, and therefore tried together. Such enumeration, in my opinion, does not include, however, charges originated by separate informations.

Section 839 (which is in Part XVIII), as amended, is as follows:

"The provisions of Part XIX, in so far as they are relevant and not inconsistent with the provisions of this Part, shall apply

mutatis mutandis to a formal statement in writing preferred and to a trial under this Part." It is argued by the Crown that the effect of that amendment is to make s. 856 (which is in Part XIX) apply to the formal statement in writing. Section 856 is as follows:

"Any number of counts for any offences whatever may be joined in the same indictment, and shall be distinguished in the manner shown in form 63, or to the like effect: Provided that to a count charging murder no count charging any offence other than murder shall be joined."

That section cannot apply to the formal statement in writing because it is in conflict with the basic section of Part XVIII, *viz.*, s. 825.

Section 825 limits the offences triable under that Part to those within the jurisdiction of the general or quarter sessions of the peace. Therefore, no offence can be set forth in the formal statement in writing unless it comes within that jurisdiction. Further, even when it comes within that jurisdiction, the consent of the accused is necessary before the Court may try him under Part XVIII, and, therefore, the formal statement in writing is further limited to those offences as to which the accused has so consented to be tried. The only exception in which his consent is not a prerequisite is an offence referred to in s. 827(3) as one "founded on the facts or evidence disclosed in the depositions". There is no such jurisdictional limitation as to the offences which may be joined under s. 856.

Section 856 is also in conflict with s. 834, which permits a charge to be preferred other than the charge for which the accused has been committed, although such additional charge does not appear or is not mentioned in the depositions, or is for a wholly distinct and unconnected offence. Such additional charge may be preferred *only with the consent of the judge*. Conditional upon such consent, such charge may be included in the formal statement in writing by virtue of s. 827(3). Again, as is obvious, there is no such limitation under s. 856.

No doubt there are a number of sections in Part XIX which, by virtue of s. 839 as amended, are made to apply to a formal statement in writing under Part XVIII, but s. 856 is not one of them.

Since, as I now hold, these two charges could not be joined in the formal statement, then they could not be tried together.

There is still a separate record for each charge, and just as two or more separate indictments cannot be tried together, neither may the separate charges, as contained in separate informations, be so tried.

The law laid down in the *Balciunas* case, and applied in the *Deur* case, is still the law, notwithstanding the amendments to which I have referred.

There is the further ground of appeal relied upon by the appellant, and on which this Court should make a finding, namely, that the appellant was refused an adjournment and thereby was prevented from submitting his full answer and defence. I can find nothing in the record supporting that argument.

The appeals should, therefore, be allowed and the convictions quashed. There should be a new trial of the accused on each charge separately, and, since the appellant has so requested in his notice of appeal, such new trials shall be before a jury.

New trials ordered.

Solicitors for the accused, appellant: Horkins, Graham & Parsons, Toronto.

Solicitor for the Crown, respondent: C. L. Snyder, Toronto.

[COURT OF APPEAL.]

Sinclair v. Blue Top Brewing Company, Limited et al.

Companies—Shares—Certificates—Sale of Shares under Execution—Non-production of Certificates—Re-arrangement of Share Structure—New Shares Substituted for Old—Rights of Buyer at Sheriff's Sale—The Companies Act, 1934 (Dom.), c. 33, ss. 31, 36, 103, 125—The Execution Act, R.S.O. 1937, c. 125, ss. 11, 12, 14.

D.B. Co. was the owner of 619 shares of the common stock of the defendant company, and was shown as such in the books of the company, by an entry made in 1930. A change was made in the share structure of the company, sanctioned by supplementary letters patent issued in 1939, whereby the existing common shares were "extinguished and replaced" by new shares, without nominal or par value, known as class "B" shares. There was a further provision in the arrangement that the right of the holders of common shares should "consist solely of the right to receive upon delivery . . . against surrender and/or cancellation of the certificates representing their respective Common shares, [an equal number of] Class B shares." D.B. Co. did not surrender its certificates for common shares, nor was any change made after 1930 in the entries respecting its shares. In 1940 the sheriff, under an execution against D.B. Co., made a seizure, and purported to sell to the plaintiff "619 shares of Class 'B' stock" in the company. The old certificates could not be produced or accounted for.

Held, in the special circumstances of the case, the company could not be compelled to enter the plaintiff's name as a holder of class "B" shares, or to issue a certificate therefor to him, without production and cancellation of the old certificates for common shares. The plaintiff acquired only the true interest of D.B. Co., the execution debtor, in the shares. The company's books constituted *prima facie* evidence that D.B. Co. had been the owner of common shares, but they were not *prima facie* evidence, and did not show, that it was the holder of any class "B" stock. The rights of holders of common shares were expressly defined, and consisted solely of a right to receive class "B" shares on "surrender and/or cancellation" of the certificates for common stock. It could not be successfully contended that class "B" shares had automatically vested in the holders of common shares. D.B. Co. could not, in the circumstances, have compelled the company to issue a certificate for class "B" shares without surrender and cancellation of the outstanding certificates, and the plaintiff therefore could not do so, even if (which was questionable) D.B. Co.'s right in this respect passed to him.

AN APPEAL by the defendant Blue Top Brewing Company Limited, from the judgment of Roach J., [1944] O.R. 506, [1944] 4 D.L.R. 319. The facts are fully stated in the reasons for judgment.

14th and 15th December 1944 and 27th March 1945. The appeal was heard by HENDERSON, GILLANDERS and LAIDLAW JJ.A.

H. C. Walker, K.C. (*J. K. Sims* with him), for the defendant, appellant: A shareholder of an incorporated company such as the appellant, to which The Companies Act, 1934 (Dom.), c. 33, applies, cannot compel the transfer of his shares without production and surrender of his share certificate. If this judgment

stands it will be the only case on record holding that a shareholder can compel a transfer without production of the certificate. [HENDERSON J.A.: That point of argument is not accurately stated. Is the respondent a shareholder? I am not certain that he is. If you admit that he is a shareholder, perhaps you had better transfer his shares to him.] We may see fit to waive a requirement stipulated under the Dominion Companies Act, but we ought not to be compelled to transfer the shares. Dominion Bond acquired the 619 shares of the capital stock of the appellant subject to the conditions set forth in the certificates for such shares, namely, that such shares are transferable only on the books of the company by the holder in person or by attorney duly constituted, and upon the surrender of the certificate properly endorsed. The appellant is not bound, and cannot be compelled, to issue a new stock certificate to replace a lost one, or alternatively, it is not bound, and cannot be compelled, to do so without first being adequately indemnified against loss. It seems reasonable that one who becomes a shareholder must guard the certificate. [LAIDLAW J.A.: The effect of your argument is that those shares become frozen if they are to be non-transferable after the loss of the certificate. You would have terminated the transferability of these shares. Where is your power to do this?] That problem is governed by s. 38(1) of the Dominion Companies Act. It is necessary to protect the public. How could one carry on under s. 36(2) of that Act, unless there was such a power? [LAIDLAW J.A.: Section 36(2) of the Dominion Companies Act makes shares transferable by endorsement of the certificate.] The transfer of the equitable title is not the transfer of the legal title. Since the shares of the appellant are now listed on the Toronto Stock Exchange, the appellant will be compelled, as long as they remain so listed, to honour as valid any transfer made by delivery of the certificates (now missing) with a duly executed transfer endorsed thereon or delivered therewith: the Dominion Companies Act, s. 36(2).

Any unrecorded dealing with the shares by the execution debtor before the sheriff's sale is not void, but remains valid as to the rights of the parties thereto towards each other. Accordingly, what the respondent got at the sheriff's sale was merely the interest which the execution debtor had in the shares at the date of the seizure, and it is impossible to be certain,

without production of the stock certificates, whether or not the respondent acquired full title, or any title, to the shares at the sheriff's sale: *Re Montgomery and Wrights Limited* (1917), 38 O.L.R. 335; *Morton v. Cowan et al.* (1894), 25 O.R. 529; *Re Phillips and La Paloma Sweets Limited* (1921), 51 O.L.R. 125, 66 D.L.R. 577. [LAIDLAW J.A.: If the sheriff's sale had the effect only of vesting in the purchaser the equity of the holder of the shares, then further action of the defendant Trotter could not better the condition of the purchaser, could it?] There is no ground for arguing that the affidavit of Trotter fed the title of the purchaser. No judgment of this Court can protect the appellant from the claims of persons not before this Court, and it is impossible to be sure that the missing certificates may not now be in the hands of some innocent person who had acquired an interest in the said shares by purchase, pledge or otherwise, before the sheriff's sale. [LAIDLAW J.A.: In order to establish the respondent's right to be registered as a shareholder, is the onus upon him to prove that the shares he bought at the sheriff's sale were unencumbered, and that there were no previous dealings with them which would leave an interest outstanding?] Yes, that is our contention, and reference is made to *Smith v. Rogers et al.* (1899), 30 O.R. 256, which was followed in *McLeod v. Brazilian Traction Light and Power Co. Ltd.*, 60 O.L.R. 253, [1927] 2 D.L.R. 875.

The trial judge erred in distinguishing *Smith v. The Walkerville Malleable Iron Company* (1896), 23 O.A.R. 95. The fact that the shares were sold under The Execution Act, R.S.O. 1937, c. 125, does not give the respondent any higher title than was held by the execution debtor at the time of the sheriff's seizure. The most that that case does is to say that such a company may have a good defence if it registers a transfer without production of the certificate; but it is no authority for the suggestion that such company can be compelled to act without production of the certificate. [LAIDLAW J.A.: There are three ways in which a valid transfer may be made. The point always comes back to whether or not there has been sufficient proof of full ownership in the execution debtor.] There are no cases that go further than *Smith v. The Walkerville Malleable Iron Company*, *supra*. Reference is made to the following English cases: *The Société Générale de Paris et al. v. Walker*

et al. (1885), 11 A.C. 20; *Re the East Wheal Martha Mining Company* (1863), 33 Beav. 119, 55 E.R. 312; *The Shropshire Union Railways and Canal Company v. The Queen* (1875), L.R. 7 H. of L. 496; *In re Ottos Kopje Diamond Mines, Limited* (1892), 1 Ch. 618; Daniel on Negotiable Instruments, 7th ed. 1933, vol. 3, Article 2093.

[GILLANDERS J.A.: There are two other English cases dealing with the question of certificates: *Re Rainford v. James Keith & Blackman Company, Limited*, [1905] 1 Ch. 296; *Guy et al. v. Waterlow Brothers and Layton (Limited)* (1909), 25 T.L.R. 515.] There is nothing in the English cases which corresponds exactly to s. 36(2) of the Dominion Companies Act.

At the time of the sheriff's sale, the defendant Trotter waived his objections to the sale, but he did not then release his claim or make any reconveyance or reassignment of his rights, and has never yet done so except to the extent that this may be said to have been accomplished in his statement of defence in this action and in the affidavit therein referred to, which was sworn a year and nine months after the sheriff's sale.

The appellant should not be asked to register the respondent as owner of the shares, or to issue new certificates without first being adequately indemnified against loss.

There has been strict compliance with s. 122 of the Dominion Companies Act, which deals with procedure. The respondent is seeking to get a judgment *in rem* when he can only get a judgment *in personam*. If the stock certificates were produced, this Court could pronounce judgment *in rem*, but not otherwise.

J. W. Pickup, K.C. (*W. B. Williston* with him), for the plaintiff respondent: The appellant has no right to require production of the old certificates even if they are outstanding. The property of the judgment debtor sold under execution was the shares and the change of ownership of the shares from the execution debtor to the purchaser at the sheriff's sale is effected by operation of the statute and not by transfer on the books of the appellant, pursuant to some transfer of the certificate by the previous holder. Once it is determined that the execution debtor at the date of the sale was the owner of the shares, ownership passed by force of the statute regardless of where any certificate evidencing prior ownership of the shares might

be: The Execution Act, ss. 11, 12, 14. The appellant company is incorporated under the Dominion Companies Act. There is nothing in this statute entitling the appellant to require surrender of a prior certificate in order to entitle the owner of shares to be registered as such. The respondent has proved the ownership of the judgment debtor at the time of the sheriff's sale not only by production of the register and the fact of the certificates being issued in the name of the judgment debtor, but by additional evidence of ownership.

If the respondent is the owner, then he is entitled by statutory right to obtain a certificate: the Dominion Companies Act, s. 33. The interest of the judgment debtor in the shares sold under execution was full ownership of the shares, and that being so, the respondent became the owner and, as such, entitled to be registered. Section 36 of the Dominion Companies Act recognizes the title of a purchaser under execution, because it excepts a transfer made by sale under execution from the statutory provision which makes transfers invalid until registered, except as exhibiting the rights of the parties thereto toward each other. Section 33 of the Act makes the certificate issued to the judgment debtor *prima facie* evidence of the title of the judgment debtor at the time of the sheriff's sale. As the respondent is the owner of the shares in question, the appellant should enter his name on its books as a shareholder of those shares, and issue a certificate thereof to him.

H. C. Walker, K.C., in reply.

Cur. adv. vult.

26th April 1945. HENDERSON J.A.:—I have had the privilege of reading the opinion of my brother Laidlaw and with an exception which I note, I am in agreement with his opinion and conclusions.

My learned brother says in part: "I am willing to assume that on that date [28th March 1939] Dominion Bond was the owner of such shares and had not previously disposed of its interest in them." In my opinion this has not been proved. It is not to be taken that my opinion decides anything but this case upon its own special circumstances. I am not prepared to say that a person registered as an owner of shares on the books of a company, or a person who is certified by the sheriff to be the purchaser, at a sheriff's sale, of shares appearing on the

books of the company to be the property of its debtor, has any right to demand the issue of a certificate certifying him to be the owner of shares upon the mere allegation that the share certificate has been lost, and without due protection to the company in the event that some person claiming to be an innocent purchaser in good faith and for valuable consideration should present the lost certificate.

I therefore agree that the appeal should be allowed, and I agree with Mr. Justice Laidlaw's disposition of the costs.

GILLANDERS J.A.:—The relevant facts are stated in the judgment of the learned trial judge reported in [1944] O.R. 506, [1944] 4 D.L.R. 319, and in the judgment of my brother Laidlaw, and need not be repeated. I am in agreement with my brother Laidlaw, and only desire to state my view on several aspects of the case.

The respondent, who by this action seeks registration as owner of the 619 shares of class "B" stock, must prove satisfactorily that Dominion Bond and Debenture Corporation Limited (referred to as "Dominion Bond"), the execution debtor, was at the time of seizure and sale the true owner of the shares in question.

In considering whether or not Dominion Bond was the owner of the shares which the plaintiff purported to purchase at the sheriff's sale, it is relevant to consider what effect, if any, s. 125(1) of The Companies Act, 1934 (Dom.), c. 33, may have under the circumstances. That subsection provides:

"All books required by this Part to be kept by the company shall in any action, suit or proceeding against the company or against any shareholder be *prima facie* evidence of all facts purporting to be thereby stated."

Among the books required to be kept by s. 103, subs. 1(b), (c) and (e), are the following:

"The company shall cause a book or books to be kept by the secretary, or some other officer specially charged with that duty, wherein shall be kept recorded

"(b) the names, alphabetically arranged of all persons who are and have been shareholders of the company;

"(c) the address and calling of every such person, while such shareholder, as far as can be ascertained;

“(e) the number of shares of each class held by each shareholder”.

The relevant records of the defendant company were in two books, (1) Ex. 15, a chronological record of transfers, and (2) Ex. 16, a stock ledger which is a loose-leaf record containing a separate page or pages for each shareholder, with the name and address of the shareholder at the top and, recorded below, the date on which such person became a shareholder, the folio where such transfer is recorded in the record of transfers, the certificate number of any shares cancelled, the certificate number of shares issued, and columns opposite to show the number of shares issued or cancelled by each such certificate. This record is arranged alphabetically and in effect contains the records to be kept by s. 103, subs. 1(b), (c) and (e).

The cover-leaf of this record has endorsed thereon

“Huether Brewing Company Limited

“Common

“Class ‘B’.”

The record had originally covered the common stock, and apparently the words “Class ‘B’ ” had been added in different ink and in a different hand after the creation of the class “B” stock, and the same book used for the recording of this stock. An examination of the book indicates that when a shareholder surrendered his common stock to have class “B” issued in its stead, the cancellation of the common stock was recorded in the proper column and the issue of the certificate for class “B” stock was recorded thereafter. In each such case the number of the certificate for class “B” stock is prefaced by the letter “B” in distinction from the numbers of the certificates for common stock recorded, which are not so prefaced. Thus the book becomes a record in compliance with the aforementioned provisions of s. 103, in respect of the common stock and also the new class “B” stock.

This record respecting Dominion Bond shows various certificates covering common shares issued and some cancelled. In the result two outstanding certificates, nos. 798, for 598 shares, and 799, for 21 shares, a total of 619 shares of common stock, are shown as outstanding. There is no record of the issue of any certificate covering class “B” stock to Dominion Bond. Even if these records be treated as *prima facie* evidence that

Dominion Bond was the holder of certificates covering 619 shares of common stock, they cannot be treated as *prima facie* evidence, and do not show, that Dominion Bond was the holder of any class "B" stock. In my view they are not sufficient in themselves to support a finding that at the time of the sheriff's sale under the execution Dominion Bond was the owner of the shares of class "B" stock in question.

Is there sufficient evidence *aliunde* to establish the title of Dominion Bond at the relevant time?

Apart from what is shown by the books of the appellant corporation and the effect of any statutory provisions, the evidence relating to the true ownership of the shares in question is largely that of the witness B. H. McCreath, who was at all relevant times and is apparently the president, managing director, and chief executive officer of Dominion Bond. Dominion Bond, said to have been described on its letterheads as investment bankers, was apparently, beginning in 1921, engaged in the business of buying, selling, and dealing in securities, until 1932 or 1933 when, as a result of some judgment against it, the company could not get a licence under The Securities Act, R.S.O. 1937, c. 265, and ceased doing business. In 1927 or 1928 Dominion Bond delivered the certificates for the 619 shares of common stock in Huether Brewery Limited owned by it to the respondent Trotter, endorsed in blank, to be held by him as collateral security for some indebtedness owing to Trotter by Dominion Bond. After the appellant had taken over the assets of its predecessor in title, these certificates were apparently returned to Dominion Bond and by them surrendered to the appellant company's transfer agent, and it appears from the records of the appellant that certificates no. 798, for 598 shares, and no. 799, for 21 shares, of common stock in the appellant company were issued and Dominion Bond was registered as the owner thereof. What subsequently happened to these certificates is not clear, and in my view the evidence in this connection is of some importance.

McCreath, in his testimony, makes a number of statements in regard to the certificates, but these are not based on any actual recollection of events, nor are they supported by any written records or memoranda, and they appear to be the result of argument, not recollection. He says the original shares in

the Ontario company were sent to Trotter as collateral security. No book or record of this is produced. He says that Trotter held them with a covering letter, but no letter or copy is produced. There is no record of their return to Dominion Bond, and, in fact, no record of Dominion Bond of any sort whatever relating to these shares at any time. He has no recollection of whether or not Dominion Bond received the new certificates from the appellant's transfer agent. He says "it would be" he or his secretary that took the old shares to the transfer agent for surrender. Finding nothing in his records he concludes that Dominion Bond did not get the new shares. This conclusion seems wholly unjustified since it is not shown that Dominion Bond had any record of them at any time. In March 1940, judgment was obtained against Dominion Bond at the suit of a creditor named Crichton, on which execution was issued and proceedings were started to sell the shares in question, this came to McCreath's notice. He says he endeavoured to locate the share certificates, although apparently no record had been kept or check made on these certificates for a period of approximately ten years. Between 1930 and 1935 McCreath had dealt, at various times, with shares of the appellant company. He concludes that if the certificates were received from the appellant's transfer agent he might have kept them and if they were to be returned to Trotter they would have been registered in Trotter's name. He concludes that no disposition was made of them by Dominion Bond because "there would be some evidence somewhere of what happened to them" and again "they were certainly not disposed of or we would have a record we could find." Not finding the certificates in the possession of Dominion Bond, he communicated with Trotter to see if he had them, whereupon Trotter, although he did not have the certificates, reasserted his right to them, and apparently continued to assert a claim thereto until immediately before the sheriff's sale.

Through the activity of McCreath, after he became aware of the Crichton action, the sale under that execution was adjourned from time to time and the Crichton claim was apparently finally settled by an agreement, to which McCreath was a party, in pursuance of which 100 shares of class "B" stock were to be delivered to Crichton.

After learning of the Crichton proceedings, McCreath advised one McLean, who was apparently an old creditor of Dominion Bond in respect of some \$4,300 owing since 1922. Some payment had been made thereon, the last in 1928 or 1929. As a result of McCreath's advice, McLean brought an action for \$7,305 against Dominion Bond, claimed to be the balance of principal and accrued interest owing on this loan, and obtained judgment by default and issued execution, and it was in pursuance of this execution that the sale of the stock in question was made to the respondent. The stock had been of little value for a number of years, but it is admitted that it was of substantial value at the time of the sale. McCreath says that his interest in the sale was to see that a reasonable price was obtained for the stock. He had information that some person or official connected with the appellant company was prepared to pay \$1,000 for the shares in question.* He had advised the respondent plaintiff not to purchase the stock under the Crichton execution, and the respondent purchased the stock at the sale under the McLean execution for \$300, which is admitted to be much less than the stock is worth.

In my view, this evidence, under the circumstances, falls short of showing affirmatively that Dominion Bond was the true owner of either class "B" stock or common stock at the time of the sale under execution. There is a complete absence of any records of Dominion Bond respecting this alleged asset of the company. The conclusions of the witness McCreath are based almost wholly on argument and not on recollection. His conclusion that the shares were not disposed of "or we would have a record we could find" seems unjustified because so far as is shown Dominion Bond had no records as such of its acquisition or the whereabouts of or dealings with this stock. In the case of a limited company engaged in the business of handling securities the complete lack of any records respecting the certificates in question, coupled with the fact that it is admitted that certificates for common shares had been endorsed in blank and delivered to a creditor of the debtor company, and the lack of personal recollection on the part of the only witness called to testify on this point, I think, under the circumstances, indicate the insufficiency of the proof.

There is a further circumstance which lends point to the defendant company, under the circumstances here, insisting on

production and surrender of the outstanding certificates. Since the sheriff's sale, it is said, class "B" stock has been, and is now, listed on the Toronto Stock Exchange. If it could be concluded that the outstanding certificates should be viewed in effect as certificates for class "B" shares, or entitling the holders thereof to class "B" shares, which are listed on a recognized stock exchange and come within the exception covered by subs. 2 of s. 36 of the Dominion Companies Act, the production of such certificates may well be a matter of more importance than would otherwise be the case.

There may be circumstances where a company would not be permitted successfully to plead a provision for the production and surrender of outstanding certificates before issuing a new certificate for or replacing the shares covered by the outstanding certificates. Where the ownership of the shares in question is satisfactorily established, and/or the destruction of the missing certificates is reasonably proved, and/or satisfactory or reasonable indemnity is offered to the company in case any claim should be made in the future, it might well be a grave injustice to a shareholder to decline the issue of new certificates. Those circumstances do not apply here. It is sufficient to say that under the peculiar and particular circumstances of this case, on the evidence furnished, the company was and is justified in declining the issue of the certificates requested. In my view the ownership of the shares in question at the time of the sheriff's sale has not been satisfactorily established. No indemnity of any kind to protect the appellant company against any claims that might be made in the future if new certificates were issued has been offered, although there is a suggestion that satisfactory indemnity might provide a solution.

I agree with the disposition of the appeal made by my brother Laidlaw.

LIDLAW J.A.:—By a judgment of Roach J. dated the 30th September 1944, it was declared and adjudged that the respondent is the owner of 619 shares of class "B" stock of the appellant Blue Top Brewing Company, Limited, entered on the share register of the appellant company in the name of Dominion Bond and Debenture Corporation, Limited. The appellant company was directed and ordered to register the respondent as the owner of such shares and to issue to him a certificate therefor;

also, to pay to the respondent any dividends or profits theretofore declared and not paid in respect of such shares.

The facts are set forth in the reasons for judgment of the learned trial judge, but it will be convenient to re-state some of them. Dominion Bond and Debenture Corporation, Limited (hereinafter referred to for convenience as "Dominion Bond") was the registered shareholder of 619 shares of the capital stock of Huether Brewery Limited. Dominion Bond was indebted to the defendant Trotter. It assigned these shares to Trotter to be held as collateral security, and delivered to him two share certificates, no. 523 for 598 shares, and no. 524 for 21 shares.

In 1927 Huether Brewing Company Limited was incorporated and acquired all the assets of Huether Brewery Limited. Thereafter the defendant Trotter sent share certificates nos. 523 and 524 to Dominion Bond to be surrendered in exchange for new certificates for shares of stock of Huether Brewing Company Limited. The certificates (nos. 523 and 524) were forwarded to and received by the transfer agent of Huether Brewing Company Limited, The Trusts and Guarantee Company Limited. Certain entries were thereupon made in the books of Huether Brewing Company Limited. An entry in the register of transfers shows under date of 18th March 1930, cancellation of certificates nos. 523 and 524 and the issue of new certificates, no. 798 and no. 799, representing 598 shares and 21 shares respectively of the common stock of Huether Brewing Company Limited. The learned trial judge finds that the new certificates were delivered to some one, and I accept that finding. The name Dominion Bond and Debenture Corporation, Limited appears in the register as transferee of those shares. The stock ledger shows under the same date, 18th March 1930, 598 shares and 21 shares of common stock, represented respectively by certificates nos. 798 and 799, standing to the credit of Dominion Bond.

The name Huether Brewing Company Limited was changed to Blue Top Brewing Company, Limited by supplementary letters patent dated the 25th September 1936.

On 28th March 1939, supplementary letters patent were issued, wherein it is recited, *inter alia*, that a compromise or arrangement between the company and its shareholders (preferred and common) was sanctioned by Honourable Mr. Justice Middleton and that the sufficiency of all proceedings required to be taken under the provisions of The Companies Act, 1934

(Dom.), c. 33, was established. The Secretary of State of Canada, by virtue of the power vested in him by that Act "and of any other power or authority whatever" confirmed and declared the compromise or arrangement to be binding upon the company and the shareholders. I reproduce certain relevant parts of the compromise or arrangement as set forth in the supplementary letters patent:

"The respective rights and claims of the said holders of . . . Common shares of the Company are hereby compromised, arranged, altered, modified and/or extinguished in the manner, to the extent, for the consideration, and subject to the terms, provisions and conditions hereinafter set forth:

.
"PROPOSAL
.

"Section 3. The existing Common shares shall be extinguished and replaced by 60,000 shares without any nominal or par value and which issue shall be known as Class B shares.

.

"Section 9. Any rights to dividends attaching to the existing Common shares shall be extinguished and the rights of the holders of such Common shares shall be compromised or arranged in such manner and to such extent that such rights shall consist solely of the right to receive upon delivery at its Head Office, Kitchener, Ontario, against surrender and/or cancellation of the certificates representing their respective Common shares, Class B shares (to be created as hereinbefore set forth) upon the following basis, that is to say:

"For each existing Common Share—1 Class B share."

On or about 12th December 1940, the sheriff of the county of Waterloo took proceedings by way of notice to the appellant company under The Execution Act, R.S.O. 1937, c. 125, and seized "all shares of Dominion Bond and Debenture Company Limited". He advertised a sale of the shares seized by him, and the advertisement described the property to be sold as 619 shares of class "B" stock of the appellant company. The respondent was the purchaser at the sale held on 14th January 1941. Thereafter the sheriff served the appellant company with a true copy of the writ of *fi. fa.*, endorsed with a certificate of sale by him to the respondent of "619 shares of class 'B' common stock." The respondent authorized and instructed the appellant com-

pany and its transfer officer to issue certificates for the shares of class "B" stock said by him to have been purchased at the sheriff's sale. He did not surrender the certificates nos. 798 and 799 representing common shares, and it is said that they cannot be found. The respondent was notified that the appellant would not issue new share certificates without the production and delivery of the old ones and that the respondent would have to find some means of fully protecting the appellant company. It does not appear that any such means were found or that any means of protection were tendered by the respondent. On the contrary, the respondent contends that there is no obligation on his part to satisfy the requirement of the appellant company.

The questions which appear to arise for determination by the Court are as follows:

(1) Is the respondent the owner of 619 class "B" shares of the capital of the appellant company?

(2) Is that company under an obligation in law, (a) to enter the name of the respondent on its books as a shareholder in respect of those shares; and (b) to issue a certificate thereof to him?

The respondent claims title by virtue of the provisions of The Companies Act, 1934 (Dom.), c. 33, s. 36, and a sale under the provisions of The Execution Act, R.S.O. 1937, c. 125, ss. 11, 12 and 14. It is provided by s. 36 of the Dominion Companies Act that with certain exceptions no transfer of shares shall be valid for any purpose whatsoever until entry thereof has been duly made in the register of transfers, or in a branch register of transfers of the company. One of the exceptions set forth is a transfer made by sale under execution. Thus, it would appear that a sale under execution constitutes a valid transfer of shares to the purchaser without an entry in the register or branch register of transfers of the company. By s. 14 of The Execution Act, where any such share is sold the sheriff is required within ten days after sale to serve upon the company a copy of the execution with his certificate endorsed thereon certifying the sale and the name of the purchaser. It is made plain by that section that the purchaser "shall have the same rights and be under the same obligations as if he had purchased the share from the execution debtor" at the time of service of notice of seizure. It is equally plain and well settled in law that a purchaser of shares at a sale under execution acquires only

the debtor's interest in the property seized. "An execution creditor can take [under his writ] only the true interest of the execution debtor, and this principle applies to cut down the apparent to the true title in the case of . . . [shares of the capital stock of a company]. The true interest alone is exigible": *Re Montgomery and Wrights Limited* (1917), 38 O.L.R. 335; see also *Morton v. Cowan et al.* (1894), 25 O.R. 529; *Jellet v. Wilkie et al.* (1896), 26 S.C.R. 282; *McDonald v. The Royal Bank of Canada*, [1933] O.R. 418, [1933] 2 D.L.R. 680; *Snettinger v. Leitch et al.* (1900), 32 O.R. 440; *Thomas v. McTavish* (1920), 18 O.W.N. 243. Thus, the respondent took only the true interest possessed by Dominion Bond in the capital stock of the appellant company at the time the sheriff gave notice of seizure as provided by The Execution Act. The primary question resolves itself into a determination of what interest Dominion Bond had in class "B" shares of the appellant company at that time. A good root of title may be taken in the entries in the register of transfers and in the share ledger of the company under date 18th March 1930. Those books are *prima facie* evidence of the facts purported to be stated thereby: the Dominion Companies Act, s. 125(1). Accordingly, it appears that on that date Dominion Bond was the transferee of 619 shares of common stock represented by share certificates nos. 798 and 799, and those shares were then standing to the credit of the said company. Did the title and interest of Dominion Bond remain unchanged after that date? It was possible for Dominion Bond, subject to the conditions and restrictions prescribed in Part I of the Dominion Companies Act, the letters patent, supplementary letters patent, or by-laws of the company, to make a transfer of the shares: the Dominion Companies Act, s. 31. The title of the transferee as against the company would not be perfected until an entry of the transfer was made in the transfer register, but Dominion Bond might, as between it and its transferee, validly divest itself of all interest and estate in the shares. There is no conclusive evidence that Dominion Bond continued to hold or possess the whole interest, or any of it, in those shares, or whether the title was free from encumbrance or infirmities after it became the owner of them. It may be—and I do not now find it necessary to decide the question—that by virtue of s. 125(1) of the Dominion Companies Act the entries in the books of the company are *prima facie* proof of the ownership by Dominion Bond of 619 shares of com-

mon stock subsequent to the date of the entries, and in particular at the time the supplementary letters patent were issued, on 28th March 1939. Be that as it may, I am willing to assume that on that date Dominion Bond was the owner of such shares and had not previously disposed of its interest in them. But it becomes of paramount importance to consider the effect in law of the supplementary letters patent and the compromise and arrangement between the appellant company and its shareholders thereby confirmed and declared to be binding. Changes were thereby made in the capital of the company, in the share structure, and in the rights of the shareholders. Before the issue of the supplementary letters patent the authorized capital of the company was \$500,000, divided into 20,000 preference shares of the par value of \$10 each, and 30,000 common shares of the par value of \$10 each. Afterwards, the authorized capital stock was 20,000 class "A" shares of the par value of \$10 each, and 60,000 class "B" shares without any nominal or par value. A new and different capital was created in substitution for the old one. The old capital ceased to exist. All shares in it consequently were obliterated. They were expressly extinguished and replaced by shares in the new capital. At the same time the rights of the holders of the shares of the old capital were defined. By s. 9 of the compromise or arrangement, quoted above, the rights of the holders of common shares were declared to "consist solely of the right to receive upon delivery at its Head Office, Kitchener, Ontario, against surrender and/or cancellation of the certificates representing their respective Common shares, Class B shares". The right to receive class "B" shares was the sole right created and given to holders of common shares in substitution for their rights in the extinguished shares. But it is made plain, in my opinion, that the new right of holders of common shares is subject to the performance of the condition expressly specified, namely, "surrender and/or cancellation of the certificates representing their respective Common shares". The surrender and/or cancellation of the certificates described is a condition precedent, which must be fulfilled before the holder of common shares can compel the appellant company to issue to him an equal number of class "B" shares, and issue a certificate representing them. I cannot accept the argument of counsel for the respondent that the common shares of the company were replaced by class "B" shares, and that the new shares automatically vested in the

holders of common shares. Assuming, therefore, as I do, that Dominion Bond was the holder of 619 shares of common stock before the issue of the supplementary letters patent, the sole right it possessed afterwards consisted of the right to receive an equal number of class "B" shares at the place and upon the conditions set forth in the compromise or arrangement made between the appellant company and its shareholders. This was the only right or interest possessed by the execution debtor at the time of the seizure by the sheriff. The execution debtor was not then the owner of class "B" shares, but only of a right to become such owner upon fulfilment of specified conditions. Nevertheless, the sheriff purported to sell class "B" shares as though they had been owned by the execution debtor, and seized from it. Such a sale was obviously a nullity, and did not transfer any estate or interest in the capital of the appellant company to the respondent. Even if it be taken that the right of the execution debtor passed to the respondent under the sale proceedings—and this I question—he cannot stand in any better position than the execution debtor in relation to the appellant company. If the execution debtor had made application for the issue to it of a certificate for class "B" shares, it could not, I think, in the circumstances here, have compelled the appellant company to issue such certificate without surrender and cancellation of the outstanding certificates for common shares.

The views I have expressed make it unnecessary to discuss at length the matter of the assignment by Dominion Bond to Trotter of shares of common stock of Huether Brewery Limited to be held as collateral security. When the certificates representing these shares were surrendered, new certificates were issued and delivered to some one. They are outstanding and have not been accounted for. It may be that Trotter was entitled to have them assigned to him in substitution for the old certificates. Likewise it might be argued that he became entitled to an assignment from Dominion Bond to him of the right to receive class "B" shares as created by the supplementary letters patent. In any case, it does not appear that, at the time the sheriff took proceedings under The Execution Act, the title of Dominion Bond was then free from encumbrance. I think the burden rested on the respondent to show that at the time of the issue of the writ of summons he possessed a right, title and interest in 619 class "B" shares of the capital of the appellant

company, of such nature and extent as to constitute him a shareholder thereof. He has not satisfied this burden, and in consequence, apart from other considerations, his claims against the appellant company cannot succeed.

Counsel for the respondent relied, in part, on the contents of a letter dated 11th March 1940, as follows:

"Mr. G. H. Gillies,

"Sheriff County of Waterloo,

"Kitchener.

"Dear Sir:

"In connection with the seizure of certain shares in Blue Top Brewing Company, Limited, registered in the name of Dominion Bond & Debenture Corporation Limited, there are, according to the stock books of the Company 619 shares of Class 'B' stock standing to their credit, of no par value.

"Yours very truly,

"BLUE TOP BREWING COMPANY, LIMITED,
(Sgd.) "A. V. Haller."

It is argued that this letter contains an admission, binding on the appellant company, that, according to the stock books of the company, 619 shares of class "B" stock stand to the credit of Dominion Bond. This letter is secondary evidence only. The books of the company are the best evidence of the facts sought to be proved. They do not show that Dominion Bond is a shareholder of any class "B" stock. A preface caption in the stock-ledger indicates that following records cover class "B" shares, but those records also include transactions in common shares. There is a separate ledger-sheet in the name of Dominion Bond, but, as stated, there is no credit entry therein for any class "B" shares. Moreover, a study of the accounts makes it apparent that credit entries for class "B" stock to replace common shares were not made except upon cancellation of certificates for an equal number of common shares. This practice and fact is not denied by counsel for the respondent. It may be observed, too, that such practice is consistent with the contention on behalf of the appellant company that certificates for common shares must be surrendered or cancelled before the holder thereof becomes entitled to class "B" shares, and certificates representing them.

It was further submitted on behalf of the respondent that the supplementary letters patent should not be admitted in evidence after judgment in the court below. It was urged that

such a course would deprive the respondent of full discovery of all relevant facts, and take away from him the right to adduce further evidence if deemed advisable in the light of such discovery. It was said that counsel for the respondent would be put in a position in which he could not raise and argue questions of waiver and estoppel on the part of the appellant company, or the validity of certain sections contained in the supplementary letters patent. When the appeal first came on for hearing it appeared to the Court that the supplementary letters patent might bear on the questions to be determined. The Court called for production of the document, and, in my opinion, this course was the proper one: see *Smith v. The Walkerville Malleable Iron Company* (1896), 23 O.A.R. 95 at 105, where it appears the Court called for the by-laws of a company. After examination of the supplementary letters patent the Court appointed a day for further hearing, and full opportunity was given to counsel to present argument bearing on the questions in appeal. There is no new issue of fact created by the admission of this document, and the respondent has not been prejudiced thereby. I think the case should not be sent back for further proceedings in the trial court, but should be concluded on the record as now constituted.

For the reasons I have given I hold:

(1) That the respondent is not the owner of 619 class "B" shares of the capital of the appellant company, and consequently,

(2) that the appellant company is under no obligation to enter the name of the respondent on its books as a shareholder of those shares, or

(3) to issue a certificate thereof to him.

My judgment accordingly is that the appeal should be allowed; the judgment in the court below should be set aside and the action should be dismissed. Costs (including costs of the defendant Trotter) of the appeal and of the action ought to be paid by the respondent.

Appeal allowed and action dismissed, with costs throughout.

Solicitors for the plaintiff, respondent: McRuer, Mason, Cameron & Brewin, Toronto.

Solicitors for the defendant company, appellant: Sims, Bray, Schofield & Lohead, Kitchener.

Solicitor for the defendant Trotter: G. T. Walsh, Toronto.

[COURT OF APPEAL.]

Rex v. White.

War Measures—Appeal from Decision of County Court Judge on Appeal from Magistrate—When Leave should be Granted—Importance of Question—P.C. 4600/1943—Constitutional Validity of Order in Council—The War Measures Act, R.S.C. 1927, c. 206, ss. 3, 4—The Criminal Code, R.S.C. 1927, c. 36, ss. 749 et seq.

The Order in Council (P.C. 4600/1943) which provides for an appeal, by leave, from the decision of a County Court Judge on appeal from the decision of a magistrate under Part XV of The Criminal Code, is a valid exercise of the powers conferred on the Governor in Council under ss. 3 and 4 of The War Measures Act. *In re Gray* (1918), 57 S.C.R. 150; *In re Chemicals Regulations*, [1943] S.C.R. 1, applied.

Leave to appeal was sought under the above Order in Council on two grounds: (1) that the trial judge had misdirected himself as to the effect to be given to the evidence of a police officer who had admittedly acted as an *agent provocateur*, and (2) that he had failed properly to interpret and apply the provisions of another Order in Council defining an "offer to sell".

Held, leave to appeal should be granted.

Per ROBERTSON C.J.O. and LAIDLAW J.A.: The second ground of the proposed appeal clearly raised a question of law or of mixed fact and law, on which leave should be granted.

Per GILLANDERS J.A.: The first ground raised a question of law, which gave the Court jurisdiction to grant leave, and the question was of sufficient importance that leave should be given. The trial judge had purported to act on a rule of law which did not exist, or on which at least there was a conflict of opinion.

Evidence—Weight—Police Spies or Agents Provocateurs.

Per GILLANDERS and LAIDLAW J.J.A.: There is no rule, either of law or of practice, which places police spies or *agents provocateurs* in a special category as witnesses, or which requires that their evidence shall be discredited, merely because, in the course of their duty, they have made false statements in order to induce the commission of an offence. *Reg. v. Mullins* (1848), 3 Cox C.C. 526; *Rex v. Bickley* (1909), 73 J.P. 239, applied; *Amsden v. Rogers* (1916), 9 Sask. L.R. 323; *Connor v. People* (1893), 36 Am. St. Rep. 295 at 300, doubted.

AN APPLICATION, under P.C. 4600/1943 ([1943] 2 C.W.O.R. 581), for leave to appeal from the judgment of Parker Co. Ct. J., of the County Court of the County of York, allowing an appeal from a conviction made by a magistrate for a violation of war-time regulations. The facts are fully stated in the reasons for judgment.

15th and 21st March 1945. The application was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW J.J.A.

At the opening of the argument, counsel for the respondent took a preliminary objection that the Court lacked jurisdiction because P.C. 4600/1943 was *ultra vires*. The Court directed that this objection should be argued first.

H. F. Parkinson, K.C., for the accused, respondent: There is no question of the validity of The War Measures Act, R.S.C. 1927,

c. 206, or of P.C. 3/1944 ([1944] 1 C.W.O.R. 28), re-establishing the Wartime Industries Control Board Regulations, under which this charge was laid.

It is clear that, under The Criminal Code, R.S.C. 1927, c. 36, there is no right of further appeal after the decision of a County Court Judge on an appeal under Part XV: *Rex v. LeBlanc*, 54 N.B.R. 50, 49 C.C.C. 136, [1928] 1 D.L.R. 539. Section 4 of The War Measures Act empowers the Governor in Council to prescribe penalties, and also to provide "whether such penalties shall be imposed upon summary conviction or upon indictment". P.C. 3/1944, in so far as it prescribes penalties and the manner of enforcing them, is good, and within the four corners of the Act, notwithstanding that it clearly deals with property and civil rights.

Although it is clearly established that Orders in Council passed under The War Measures Act are not statutes, yet they have the force of statutes, and are good law only if they are clearly within the terms of the Act. They are secretly passed, and promulgated without previous notice to the public. Parliament alone has the right to say whether or not there shall be a right of appeal in a matter where there has theretofore been no such right. [ROBERTSON C.J.O.: There is nothing in The War Measures Act that limits the practice to that laid down in the Code.] Sections 28 and 29 of The Interpretation Act, R.S.C. 1927, c. 1, make that clear. This prosecution was in fact conducted under Part XV of the Code.

There was no urgency about this matter, and this provision could and should have been made, if at all, by Parliament. [GILLANDERS J.A.: You admit that there is a power to provide for penalties. Does that not imply a power to prescribe procedure, and to give a right of appeal?] No, because The War Measures Act provides only that the Governor in Council may prescribe either procedure by summary conviction or procedure by indictment.

J. R. Cartwright, K.C., (*J. D. Arnup* with him), for the Attorney General of Canada, appellant, on the preliminary objection: This point has not previously been raised. P.C. 4600/1943 was considered by this Court in *Rex v. Disano*, [1944] O.W.N. 404, 81 C.C.C. 272, [1944] 3 D.L.R. 528, and *Rex v. Vanek*, [1944] O.R. 428, 82 C.C.C. 53, [1944] 4 D.L.R. 59, and by the Supreme Court

of Canada in *Ouvrard v. Quebec Paper Box Company Limited*, [1945] S.C.R. 1, 83 C.C.C. 16, [1945] 1 D.L.R. 522, and in all these cases it seems to have been assumed that the Order in Council was valid.

Section 4 of The War Measures Act does not restrict the general powers of the Governor in Council under s. 3, except as to the limits of the penalties which may be prescribed: *Rex v. Goossen*, 50 Man. R. 384, [1943] 1 W.W.R. 261, 79 C.C.C. 214. Unless something in the Act expressly limits them, the powers of the Governor in Council under it are as wide as those of Parliament itself: *In re Gray (Grey)*, 57 S.C.R. 150, 42 D.L.R. 1, [1918] 3 W.W.R. 111; *In re Chemicals Regulations*, [1943] S.C.R. 1 at 10, 12, 17, 79 C.C.C. 1, [1943] 1 D.L.R. 248. It is clear from reading P.C. 4600/1943 that the Governor in Council has considered its provisions necessary, and it would clearly be within Parliament's powers to provide for such a right of appeal. Section 4 of The War Measures Act does not, either expressly or by implication, prevent the Governor in Council from making alterations in the established procedure. Any such limitation would require to be clearly expressed. [ROBERTSON C.J.O.: If s. 4 merely said that the Governor in Council might prescribe penalties, where would you go to find the power to prescribe the means of imposing such penalties?] It would be implied under s. 3. Section 4 is really unnecessary, since s. 3(2) gives an express power which would include all the provisions of P.C. 4600/1943. [LAIDLAW J.A.: If P.C. 4600/1943 can be looked at as empowering the Court of Appeal to grant leave, is it not necessarily incidental to the other powers, to secure uniformity of interpretation?] Yes.

Under The War Measures Act, the Governor in Council can render any other statute invalid, in whole or in part. Any limitation on this power must be found in the Act itself: *In re Gray*, *supra*, at p. 158 (S.C.R.); *Rex v. Williams*, [1944] S.C.R. 226 at 236, 81 C.C.C. 257, [1944] 3 D.L.R. 225. [ROBERTSON C.J.O.: There is also a discussion of this question in *Rex v. Spence* (1919), 45 O.L.R. 391 at 410-11, 31 C.C.C. 365].

The respondent's argument on this question would be equally applicable to P.C. 3/1944, which undoubtedly contains provisions (*e.g.*, ss. 15(1), 15(4), 15(5)) which are inconsistent with The Criminal Code. But the respondent concedes the validity of that Order in Council.

H. F. Parkinson, K.C., in reply: Any Order in Council which was clearly within the four corners of The War Measures Act could admittedly override any other statute. But a proper construction of the Act does not authorize what is here done, which is in direct conflict with s. 752 of the Code.

The Court reserved judgment on the preliminary objection, and directed counsel to proceed with argument on the application for leave.

J. R. Cartwright, K.C.: Leave to appeal is sought on two grounds: (1) that the trial judge misdirected himself in law as to the weight to be given to the evidence of police officers and a woman who had assisted them, because the officers had admittedly made misrepresentations to the accused; (2) whatever view was taken of the evidence, the trial judge wrongly directed himself in law as to what constitutes an offer to sell.

(1) The trial judge correctly directed himself that these witnesses were not accomplices, and were not within the rule of practice requiring corroboration, but he continued, incorrectly, to say that he "must" refuse to accept their evidence, where it was contradicted, because of their misstatements of fact to the accused. In effect, he directed himself that when a witness has admittedly made misstatements, not only must his evidence be regarded with suspicion, but it must not be accepted if it is contradicted by the defence. If a jury were told that they should not accept the evidence of a witness who admitted that he had lied, that would be misdirection in law; they should not even be told that the evidence should be received with suspicion: *Reg. v. Mullins* (1848), 3 Cox C.C. 526, adopted in *Rex v. McCranor* (1918), 44 O.L.R. 482 at 485, 31 C.C.C. 130, 47 D.L.R. 237; *Rex v. Bickley* (1909), 73 J.P. 239, 2 Cr. App. R. 53. There is a useful discussion of the use of police spies in *Rex v. Berdino*, 34 B.C.R. 142, 42 C.C.C. 308, [1924] 3 W.W.R. 198, [1924] 3 D.L.R. 794.

The expression "rule of practice" means only that the rule arose as a matter of practice: see *Rex v. McCranor*, *supra*; *Rex v. Disano*, *supra*, at p. 405. In the case of accomplices, the rule has become so well established that it is one of law, at least for purposes of appeal: *Gouin v. The King*, [1926] S.C.R. 539, 46 C.C.C. 1, [1926] 3 D.L.R. 649. There are many other cases where the correctness of the trial judge's charge as to an accomplice's evidence has been discussed in the Supreme Court of Canada.

[ROBERTSON C.J.O.: Your point really is that the trial judge has purported to follow a rule of law which does not exist?] Yes, and that the rule propounded by him is in fact contrary to the established rule.

A trial judge, sitting without a jury, can be said to "misdirect himself": *Belyea v. The King*; *Weinraub v. The King*, [1932] S.C.R. 279 at 296, 57 C.C.C. 318, [1932] 2 D.L.R. 88; *Rex v. Boak*, [1925] S.C.R. 525 at 529, 44 C.C.C. 218 at 222, [1925] 3 D.L.R. 887.

As to what constitutes a question of "mixed fact and law", see Archbold's Criminal Pleading, Evidence and Practice, 31st ed. 1943, p. 308.

(2) Even reading the evidence in the light most favourable to the accused, there was in law an offer to sell, as defined by s. 16(5) (c) of P.C. 3/1944. The accused admittedly wrote out the order and began to count the money.

H. F. Parkinson, K.C.: This Court should look at the preamble of P.C. 4600/1943 to see the principles upon which leave to appeal should be granted. This case does not involve the interpretation of any order or regulation, nor is it one of particular importance. The Governor in Council never contemplated an appeal from the decision of a County Court Judge, based on his appreciation of the evidence.

As to the two proposed grounds:

(1) The trial judge did properly understand the law: *Amsden v. Rogers* (1916), 9 Sask. L.R. 323, 26 C.C.C. 389, 10 W.W.R. 1337, 34 W.L.R. 1174, 30 D.L.R. 534; *Rex v. Kinney*; *Rex v. Tommy*; *Rex v. McKinley*, 2 M.P.R. 242, 55 C.C.C. 350, [1931] 3 D.L.R. 668; *Rex v. McCranor*, *supra*. He made a finding of fact, as to the credibility of the witnesses, and there should not be leave to appeal as to this.

(2) Section 16(5) (c) of P.C. 3/1944 does not mean that proof of an invitation for offers to buy shall be *conclusive* proof of an offer to sell—it merely means that it shall be evidence of such an offer. The question here, again, is merely as to the weight to be given to the evidence of the witnesses heard by the trial judge.

The trial judge has weighed the evidence, and acquitted, and there is no ground on which leave to appeal should be granted.

J. R. Cartwright, K.C., in reply: As to the effect of the preamble of P.C. 4600/1943, see the judgment of Kellock J.A., in *Rex*

v. Vanek, supra, at p. 435 (O.R.). *Amsden v. Rogers, supra*, is wrong in law, and contrary to both *Reg. v. Mullins, supra*, and *Rex v. McCranor, supra*.

Cur. adv. vult.

27th April 1945. ROBERTSON C.J.O.:—In my opinion leave to appeal should be granted as applied for. The ruling of the County Court Judge that there was no offer involves a question of law or of mixed law and fact. Upon the matter of the attitude of the Court in relation to the evidence of a witness coming within the description of "*agent provocateur*", some of the observations of the learned County Court Judge are capable of the interpretation that he considered that there was some rule on the matter by which he was bound, quite apart from any opinion he might have formed as to the credibility of the particular witness. Whether it was a rule of law or a rule of practice may not be entirely clear from the remarks of the learned judge, but upon the point first mentioned I think a point of law or of mixed law and fact is plainly raised.

GILLANDERS J.A.:—This is an application on behalf of the Attorney General for Canada for leave to appeal to this Court from a judgment of His Honour Judge Parker, sitting in the County Court of the County of York, by which he allowed the respondent's appeal, and quashed a conviction which had been made against the respondent by a police magistrate, by which the respondent was convicted of offering to sell a used passenger motor vehicle at a price in excess of that fixed by order M.V.C. 18A of the Motor Vehicles Controller, thereby contravening the provisions of the Wartime Industries Control Board Regulations, as re-established by P.C. 3/1944 ([1944] 1 C.W.O.R. 28).

Counsel for the respondent, as a preliminary objection to the application, submitted that Order in Council P.C. 4600/1943 ([1943] 2 C.W.O.R. 581), under which leave to appeal in this case is sought, and which provides the only avenue of appeal to this Court, is invalid and *ultra vires*.

In view of the points to be considered in connection with the matter, it is probably desirable to set out those portions of P.C. 4600 which should be kept in mind here. It provides in part:

"Whereas the Minister of Justice reports that a very large proportion of the prosecutions for breaches of wartime regula-

tions are conducted under Part XV of the Criminal Code, relating to summary convictions, for the reason that in these cases it is of great importance that conviction and punishment should follow quickly upon the commission of the offence and for this reason proceedings by way of summary conviction are resorted to in preference to proceedings by way of indictment; and

“That under Part XV aforesaid trials are conducted by magistrates or justices of the peace, and there is an appeal to or a trial *de novo* by a judge of the county or district court (In the Province of Quebec, a judge of the Court of King’s Bench, Crown Side), and the decision of such appellate judge is final;

“And whereas the Minister further reports that, in many of these prosecutions under Part XV aforesaid, questions of law of first rate importance are not infrequently raised relating to the validity and the construction of wartime regulations and it has been represented to him that, in the interest of uniformity of decisions as well as the true construction of all wartime regulations, further appeals should be allowed to the provincial courts of appeal and the Supreme Court of Canada wherever, in the opinion of the court to be appealed to, an important question of law or of mixed law and fact is raised.

“And whereas it is deemed necessary or advisable for the security, defence, peace, order and welfare of Canada that such appeals be provided for;

“Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice, and under and by virtue of the powers vested in the Governor in Council by The War Measures Act, Chapter 206, Revised Statutes of Canada, 1927, is pleased to make the following regulations and they are hereby made and established accordingly,—

“REGULATIONS

“1. In these regulations, unless the context otherwise requires,—

“(a) ‘court of appeal’ means, in the province in which an offence is alleged to have been committed, the court designated in paragraph (7) of section 2 of the Criminal Code as the court of appeal for that province;

“(b) ‘Wartime regulations’ means any regulations or orders made under the authority of the War Measures Act.

"2. In any proceedings under Part XV of the Criminal Code for an offence against wartime regulations, an appeal from a judgment of the county or district court judge or, in the Province of Quebec, the judge of the Court of King's Bench, Crown Side, on any ground of appeal which involves a question of law or of mixed law and fact shall lie to the Court of appeal by leave of such court."

Mr. Parkinson does not question the constitutionality of The War Measures Act, R.S.C. 1927, c. 206, in pursuance of which P.C. 4600 was passed. He concedes that as enacted by s. 4 of that Act—

"The Governor in Council may prescribe the penalties that may be imposed for violations of orders and regulations made under this Act, and may also prescribe whether such penalties shall be imposed upon summary conviction or upon indictment but no such penalty shall exceed a fine of five thousand dollars or imprisonment for any term not exceeding five years, or both fine and imprisonment."

He submits, however, that the Governor in Council is given no power to prescribe that an appeal may lie or to provide for an appeal which otherwise does not lie; that such power is not incidental to or included in the powers given to the Governor in Council by s. 4, and could be effectively exercised only by Parliament. He submits that the procedure, both upon summary conviction and upon indictment, as provided by The Criminal Code, R.S.C. 1927, c. 36, is the only procedure applicable for the imposition of penalties prescribed in pursuance of the powers given by s. 4 of The War Measures Act, and because, in the procedure so provided, no appeal would lie to this Court in proceedings by summary conviction, the application should be dismissed.

In my view the power to prescribe penalties which may be imposed for violation of the orders and regulations includes the power to prescribe how and subject to what conditions the penalty may be imposed and, as here, to provide for a right of appeal where this is thought desirable.

In any event, apart from s. 4, the broad powers conferred upon the Governor in Council by s. 3 would seem sufficient and ample to support the validity of the Order in question. There is nothing in The War Measures Act specifically cutting down the wide powers conferred by s. 3: see *In re Gray (Grey)*, 57 S.C.R

150, 42 D.L.R. 1, [1918] 3 W.W.R. 111, and *In re Chemicals Regulations*, [1943] S.C.R. 1, 79 C.C.C. 1, [1943] 1 D.L.R. 248, particularly *per* Mr. Justice (now Chief Justice) Rinfret, at p. 17:

"The powers conferred upon the Governor in Council by the *War Measures Act* constitute a law-making authority, an authority to pass legislative enactments such as should be deemed necessary and advisable by reason of war; and, when acting within those limits, the Governor in Council is vested with plenary powers of legislation as large and of the same nature as those of Parliament itself (Lord Selborne in *Reg. v. Burah* (1878), 3 App. Cas. 889). Within the ambit of the Act by which his authority is measured, the Governor in Council is given the same authority as is vested in Parliament itself. He has been given a law-making power.

"The conditions for the exercise of that power are: The existence of a state of war, or of apprehended war, and that the orders or regulations are deemed advisable or necessary by the Governor in Council by reason of such state of war, or apprehended war.

"Parliament retains its power intact and can, whenever it pleases, take the matter directly into its own hands."

Although it is of course not in point here, it is of interest in this connection to note the judgment of Viscount Simon L.C., in *King-Emperor v. Benoari Lal Sarma et al.*, [1945] A.C. 14.

The application for leave to appeal was based, as stated, on Order in Council P.C. 4600/1943. Leave is sought on two grounds:

(1) that the learned County Court Judge misdirected himself as a matter of law or mixed law and fact as to the weight to be given to the evidence of police witnesses, on the ground that they had made misrepresentations of fact to the respondent; and

(2) that he wrongly directed himself in law as to what constitutes an offer to sell.

The respondent was a car salesman in the employ of one Steinberg, proprietor of a firm dealing in motor cars under the name of Drayton Motors. Steinberg and the respondent were both similarly charged, but separate trials were ordered. It was charged that the respondent offered to sell a used passenger motor vehicle to one E. H. S. Smith, at a price in excess of the maximum price fixed by certain war orders. The maximum

price as mentioned is colloquially called the "ceiling" price, and may be so termed. E. H. S. Smith, the proposed purchaser of the vehicle, was a police officer, a member of the Royal Canadian Mounted Police, and the evidence against the respondent was wholly that of Smith, another officer of the R.C.M.P. and his wife. Smith admittedly acted in the matter as an *agent provocateur*. When he, Smith, went to inspect the used motor cars kept for sale where the respondent was employed, he went for the express purpose of ascertaining whether or not cars were being sold there in excess of the fixed "ceiling" price. He did not tell the respondent that he was a police officer. In the course of his discussion he said he needed a car badly. On returning to the respondent's place of business he introduced the wife of a brother police officer as his wife, come to inspect the car, and in signing the order for purchase he used the name and address of a brother of his, who was not a police officer.

The respondent was convicted by the magistrate and appealed to the County Judge, where the matter was heard *de novo*. At the conclusion of the appeal the learned County Court Judge allowed the appeal and quashed the conviction.

Dealing with the first ground raised, respecting the evidence of the police witnesses, the judge said in part, in discussing the matter with counsel in argument after the evidence was completed,—

"First of all, the evidence on which I am asked to convict is the evidence of a man who goes out and confesses he deliberately lies to produce this offence, therefore, it is reasonable to expect, and I must give consideration to that phase, a man who would go out and lie to obtain an offence and induce an offence, how far will he go in stretching the truth to obtain a conviction? Undoubtedly, he will put it in the most favourable light for the charge he has laid. That is self-evident, no one will contradict that."

And again: "I do not think I can find on the evidence, with the weight I must attach to *agent provocateur*, in view of the evidence for the defence, that there was ever an offer made by White."

And yet again: "It is a very difficult position for a judge to be put in, to be asked on the evidence of an *agent provocateur* who has deliberately lied, and I use the word reservedly, deliber-

ately lied, to obtain the commission of an offence. Certainly the Bench cannot be asked to accept the evidence at its face value; if a man will lie on one occasion, will he lie on another?"

Counsel for the applicant urges that the learned judge in effect erroneously instructed himself, as a rule of law, that he must or should view the evidence of the police officer with suspicion because he had acted as an *agent provocateur* and had made false representations to the respondent. He contends that no such rule exists and that in effect the rule is otherwise; that the cases indicate that these facts should in themselves in no way invalidate or detract from the evidence of such a witness.

The use of police spies or *agents provocateurs* or, to use a term of opprobrium employed at times by persons critical of the practice, "stool pigeons", has long had a well-recognized and useful place in the enforcement of certain laws. It is well recognized that certain laws could not be adequately enforced and the frequent and notorious breach thereof prevented without the employment and use of police spies. See the useful discussion by Martin J.A., in *Rex v. Berdino*, 34 B.C.R. 142, 42 C.C.C. 308, [1924] 3 W.W.R. 198, [1924] 3 D.L.R. 794.

As to the evidence of such witnesses, in *Reg. v. Mullins* (1848), 3 Cox C.C. 526, it was held that the evidence of a person employed by the Government to mix with conspirators and pretend to aid their designs for the purpose of betraying them, did not require corroboration as that of an accomplice; Maule J. said in part:

"Now as to spies, I know of no rule of law which declares that their evidence requires confirmation, nor any rule of practice which says that juries ought not to believe them."

In *Rex v. Bickley* (1909), 73 J.P. 239, 2 Cr. App. R. 53, the charge was one of unlawfully supplying a noxious thing to a woman to procure a miscarriage. The principal witness for the prosecution was a woman who had acted as a police spy, pretending that she was in need of illegal aid from the accused. The Court pointed out that her evidence was not to be treated as that of an accomplice, and Walton J., quoted Maule J., in *Reg. v. Mullins*, *supra*, as follows:

"This woman was a spy, and that she acted with the knowledge and approbation of the police was clear from the evidence that was put before the jury. That being so, there is no ground for saying that the jury ought to have been more fully warned

as to her evidence. They were told that she was sent by the police to the appellant to see whether he would commit the offence which he was subsequently accused of committing."

In *Amsden v. Rogers* (1916), 9 Sask. L.R. 323, 26 C.C.C. 389, 10 W.W.R. 1337, 34 W.L.R. 1174, 30 D.L.R. 534, the accused was charged with selling liquor contrary to a provincial statute. The evidence for the prosecution was that of a special constable who acted as a police spy. Lamont J. said:

"I do not say that in their efforts to secure evidence in cases where crimes have been committed the officers of the law are not sometimes entitled to resort to pretence and even false statements. There may be cases where that is necessary in the interests of justice to enable them to secure the evidence, and the fact that an officer has resorted to the subterfuge may not cast discredit upon the evidence which he discovers by means thereof. But, in my opinion, it is a different matter where the false statements are made, not for the detection of crime committed but for the purpose of inducing its commission, and inducing its commission in order that the person making these statements may be able to prefer a charge for the offence committed at his solicitation. The evidence of such a witness must, in my opinion, be scrutinized with great care."

He proceeds to quote from an American opinion in *Connor v. People* (1893), 36 Am. St. Rep. 295 at 300, as follows:

"When in their zeal, or under a mistaken sense of duty, detectives suggest the commission of a crime or instigate others to take part in its commission in order to arrest them while in the act, although the purpose may be the capture of old offenders, their conduct is not only reprehensible but criminal, and ought to be rebuked rather than encouraged by the Courts", and observes that while not prepared without further consideration to adopt this as a rule of universal application, expresses the view "there is a great deal of force in what the Court there said". It is of some interest to note that this same opinion was pressed upon the Court of Criminal Appeal in *Rex v. Bickley, supra*, and in this connection the Court there observed (*per* Walton J.):

"The case of *Connor v. People, supra*, has been cited to us. It is the custom of our courts to listen to what is said by American judges, and to see whether their reasoning commends itself to us. This case was cited in support of the objection; but

on looking at it we do not find that anything was decided as to the way in which the evidence of spies should be treated. The point dealt with was that to constitute larceny there must be a taking of property without the consent of the owner."

After setting out the quotation in question, the Court observed:

"That may or may not be well founded; we are not called upon to express any opinion on the dictum."

It may also be observed that in the *Amsden* case, the trial judge states:

"For the prosecution it is urged that but little weight could be given to the evidence of the accused, as he was so vitally interested in the result. On the other hand, *Amsden* admitted that in order to get the accused's name he had made a false statement to him. *Amsden* also admitted that, on another occasion, he had made false statements to a druggist in order to ascertain if he were selling liquor contrary to the Act."

It may be doubted whether the false statements alleged to have been made in that particular case provided a basis for the rather sweeping opinion expressed.

There may be circumstances where a type or method of inducement or instigation of crime differs greatly in quality and quantity from what has been said to have been done here. I would hesitate to accept the view expressed in the *Amsden* case, certainly in the broad terms in which it is stated, and indeed it would seem to be in conflict with the view indicated in *Reg. v. Mullins, supra*. Where a police officer in proper circumstances in the performance of his duty makes false statements, even to invite a breach of the law, and in a prosecution arising out of an alleged breach following such statements fully discloses what was done, I see no reason to conclude that as a rule of general application his evidence should be scrutinized with great care or suspicion merely because he has made such statements in the course of his duty. His evidence might be believed and accepted or it might be disbelieved and rejected in part or in whole, but, in my view, it should not be rejected, weakened, or placed under a shadow of suspicion and doubt by reason only of the fact that he had made such statements in the course of his duty. I am of opinion that the learned trial judge purported to act on a rule of law which does not exist, or at least on which there is conflict of opinion, and that this raises a question of law.

It was further urged that in any event the matter in issue does not come within the cases envisaged by P.C. 4600/1943, in that it does not raise a question of law of first-rate importance relating to the validity and construction of wartime regulations.

In my view, as I have stated, the appeal raises a question of law which gives this Court jurisdiction to grant leave in pursuance of s. 2 of the Regulations, and the question is of sufficient importance that leave should be given.

As indicated, it was also urged that there was an error of law relating to what constituted an offer to sell. In view of the opinion expressed on the first ground, I do not find it necessary to consider this submission.

Leave to appeal should be granted.

LAILAW J.A.: The Attorney General of Canada applies for leave to appeal from the judgment of His Honour Judge Parker, pronounced in the County Court of the County of York on the 21st day of December 1944, quashing the conviction of the respondent by Magistrate Gullen at the city of Toronto on the 15th day of November 1944, on a charge that he did unlawfully offer to sell a used passenger motor vehicle to one E. H. S. Smith, at a price in excess of the maximum price as fixed by order No. M.V.C. 18A of The Motor Vehicles Controller dated the 29th day of September 1943, and did thereby contravene the Wartime Industries Control Board Regulations, re-established by Order in Council P.C. 3/1944.

I need not re-state the facts set forth in the reasons for judgment of my brother Gillanders.

A preliminary objection was taken by counsel on behalf of the respondent. It was argued that Order in Council P.C. 4600, dated the 7th day of June 1943 (amended by Order in Council P.C. 6713 dated August 25th 1944) is *ultra vires* of the Governor in Council. In my opinion effect cannot be given to this objection. I think that it was within the powers of His Excellency the Governor in Council, under and by virtue of the powers vested in him by The War Measures Act, R.S.C. 1927, c. 206, to make and establish the orders and regulations in question. The constitutional validity of The War Measures Act was not questioned. It was said, however, that by reason of the provisions of The Criminal Code, R.S.C. 1927, c. 36, s. 752, no appeal lies to this Court from the judgment of the County Court, after an appeal

to that Court from a summary conviction by a magistrate, and that Parliament alone possesses the power to enact legislation giving the right purported to be created by Order in Council P.C. 4600. It is beyond controversy that the power to grant leave and to entertain an appeal as contained in the Order in Council in question could be vested in the Court of Appeal by an Act of Parliament. Also an Order in Council passed in conformity with the conditions prescribed by and the provisions of The War Measures Act has the effect of an Act of Parliament: *In re Gray (Grey)*, 57 S.C.R. 150, 42 D.L.R. 1, [1918] 3 W.W.R. 111; *In re Chemicals Regulations*, [1943] S.C.R. 1, 79 C.C.C. 1, [1943] 1 D.L.R. 248. It is my view that the Order in Council in question falls within the conditions and provisions of The War Measures Act. By s. 3 of that statute, the Governor in Council may make such orders and regulations as he may deem necessary or advisable for the "security . . . peace, order and welfare of Canada." It is expressly provided that the generality of the terms of the enactment is not to be restricted. The Order in Council purports on its face to be made in the exercise of this power and discretion, and we ought not to hold that such power and discretion was improperly exceeded or exercised. On the contrary, it is my view that the provisions of the order are plainly within the quoted terms of the Act.

Again, by s. 3(2) of the statute, it is provided that "All orders and regulations . . . shall be enforced in such manner and by such courts . . . as the Governor in Council may prescribe. . . ." The power to prescribe the courts by which orders and regulations shall be enforced involves and includes the powers to provide that a designated court shall have jurisdiction to entertain an appeal to it from a lower court and to grant leave to appeal therefrom.

This power was created and exists notwithstanding that in the ordinary course of proceedings under the provisions of The Criminal Code no appeal lies from a judgment of the County Court after an appeal to that Court from a summary conviction by a magistrate. Proceedings for the enforcement of orders and regulations made under The War Measures Act are the subject of special consideration and provision both as to the manner and the courts in which they are to be carried on.

The decision to grant or refuse leave to appeal depends upon the nature of the questions raised for hearing. The questions are not confined to those raised in the proceedings before the County Judge: *Rex v. Vanek*, [1944] O.R. 428, 82 C.C.C. 53, [1944] 4 D.L.R. 59.

If the appeal involves a question of law or of mixed law and fact, the Court may grant leave to appeal, but not otherwise. But I am of the opinion that leave ought not to be given unless it be made to appear to this Court that such a question is of "first rate importance": *Rex v. Disano*, [1944] O.W.N. 404, 81 C.C.C. 272, [1944] 3 D.L.R. 528. It may be observed that in *Rex v. Vanek*, *supra*, at p. 432, the Honourable the Chief Justice stated that the question there involved was undoubtedly of importance. Accordingly, I inquire whether a question of law or of mixed law and fact of sufficient importance, in the opinion of this Court, to justify an order granting leave to appeal has now been raised.

The grounds upon which the applicant seeks to set aside the judgment of His Honour Judge Parker are set forth in the notice of application for leave to appeal. In so far as they bear on the question now under consideration, I may summarize them as follows: (1) the learned judge misdirected himself as to the weight to be given to the evidence adduced by the Crown; (2) the learned judge misdirected himself as to what constituted an offer to sell under the provisions of the Wartime Industries Control Board Regulations (P.C. 3/1944).

The learned trial judge came to the conclusion on the evidence that the onus resting on the Crown to prove the charge against the accused had not been satisfied. He states his finding in these words: "I do not think I can find on the evidence, with the weight I must attach to *agent provocateur*, in view of the evidence for the Defence, that there was ever an offer made by White." Again, he says: "I could not say beyond a reasonable doubt, and of course, the accused is entitled to that doubt, that he at any time made a definite offer to sell this car." There can be no doubt that the finding of the learned judge depended upon and was dictated by the view taken by him as to the credibility of the Crown witnesses and, in particular, the witness Smith whom he terms an *agent provocateur*. He says: "... the evidence on which I am asked to convict is the evidence of a man who goes out and confesses he deliberately lies to produce this offence, therefore, it is reasonable to expect, and I must give consideration to that phase,

a man who would go out and lie to obtain an offence and induce an offence, how far will he go in stretching the truth to obtain a conviction? Undoubtedly, he will put it in the most favourable light for the charge he has laid. That is self-evident, no one will contradict that." Again, in considering the weight of the testimony given by Constable Smith, the learned judge says: "He continued his dishonesty or false statements right up to the closing of the events. . . . Certainly the Bench cannot be asked to accept the evidence at its face value; if a man will lie on one occasion, will he lie on another?" Finally, the learned judge says: "I cannot convict a man on such evidence as the Crown has adduced here." It does not appear that the criticism of the learned trial judge of the evidence given by Constable Smith arises by reason of his demeanour in the box or otherwise than from his conduct and acts leading up to the offence charged against the accused. He regarded the evidence with suspicion, and rejected it, solely on the ground that Constable Smith, by false representation, invited or induced the accused to engage in an unlawful act. With much respect, I am of the opinion that the learned judge improperly discredited the police constable. I can see no reason to criticize his conduct in any way but, on the contrary, am impressed with the view that he was carrying out his duty as an officer of the law in a proper and necessary manner under the circumstances. That he resorted to false representations or disguise for the purpose of obtaining the evidence does not necessarily discredit him or invalidate his evidence. Indeed, it would be difficult, if not impossible, for officers of the law to prevent or successfully combat crime of certain kinds (including offences charged against the accused), except by employment of measures involving masquerade, deceit and false representation: *Reg. v. Mullins* (1848), 3 Cox C.C. 526; *Rex v. Bickley* (1909), 73 J.P. 239, 2 Cr. App. R. 53; *Rex v. Berdino*, 34 B.C.R. 142, 42 C.C.C. 308, [1924] 3 W.W.R. 198, [1924] 3 D.L.R. 794. A police officer or detective is not in the same class as an accomplice, and the rule of practice as to corroboration of evidence given by accomplices is not applicable to such persons: *Rex v. McCranor* (1918), 44 O.L.R. 482 at 485, 31 C.C.C. 130, 47 D.L.R. 237; *Rex v. Kinney*; *Rex v. Tommy*; *Rex v. McKinley*, 2 M.P.R. 242, 55 C.C.C. 350, [1931] 3 D.L.R. 668.

Nevertheless, it is proper to scrutinize carefully the testimony against a prisoner given by policemen, constables, and others em-

ployed in the suppression and detection of crime: *Reg. v. Dowling* (1848), 3 Cox C.C. 509 at 516, referred to in *Rex v. Nat Bell Liquors Limited*, 16 Alta. L.R. 149, 35 C.C.C. 44, [1921] 1 W.W.R. 563, 56 D.L.R. 523 at 555, reversed on other grounds, [1922] 2 A.C. 128, 37 C.C.C. 129, [1922] 2 W.W.R. 30, 65 D.L.R. 1; *Amsden v. Rogers* (1916), 9 Sask. L.R. 323, 26 C.C.C. 389, 10 W.W.R. 1339, 34 W.L.R. 1174, 30 D.L.R. 534. See also Taylor on Evidence, 12th ed., vol. 1, p. 58.

While I do not agree with the reasons or premises which influenced the learned judge to his conclusion, I cannot hold that any question of law or mixed law and fact arises by reason of the absence of weight he gave to the evidence adduced on behalf of the Crown. Leave to appeal should not be granted if the only ground is that the verdict is against the weight of evidence: *Rex v. Burke* (1908), 1 Cr. App. R. 245.

But the finding of guilt or innocence of the accused on the charge made against him in this case does not depend alone on the weight of evidence. It depends also on the effect to be given in law to a provision in Order in Council P.C. 3, dated the 4th day of January 1944, and which I reproduce, in part, as follows:

"16(5) In any proceedings for an offence against these Regulations. . . .

"(c) proof of an invitation for offers to buy shall be proof of an offer to sell."

It does not appear that this provision was the subject of consideration in the proceedings before the learned trial judge. Counsel for the applicant argues that if the testimony of the accused be taken with such portions of the evidence for the prosecution as were not contradicted, there was an offer to sell within the meaning of the provision quoted, and in consequence the finding of the learned judge is in error. The effect of the provision quoted and its applicability to the evidence are questions which bear directly on the verdict which ought to be found on the evidence. Moreover, they are questions of law and of great importance on this and other cases of the same kind. Therefore, I am of opinion that leave to appeal from the judgment of His Honour Judge Parker ought to be granted.

Leave to appeal granted.

Solicitor for the appellant: N. L. Mathews, Toronto.

[COURT OF APPEAL.]

McNeil v. Fingard.

Damages—Personal Injuries—Measure of Damages—Proper Direction to Jury—Substantial Wrong or Miscarriage—The Judicature Act, R.S.O. 1937, c. 100, s. 27(1).

In an action for damages for physical injuries sustained by the plaintiff when she was knocked down by the defendant's automobile, the trial judge told the jury that the plaintiff was "entitled in a case of this kind to recover by way of damages such compensation as will put her in the same position, so far as money can do so, as she was before the accident happened". The jury awarded slightly more than \$5,500, and the defendant appealed, contending, *inter alia*, that the passage quoted above constituted misdirection.

Held, by the majority, the appeal should be dismissed.

Per LAIDLAW J.A.: This passage in the trial judge's charge constituted misdirection in law, but a careful study of the evidence indicated that the same verdict could reasonably have been found if this passage had been omitted from the charge. The misdirection therefore did not occasion any substantial wrong or miscarriage, and the appeal should be dismissed under s. 27(1) of The Judicature Act.

Per McRUER J.A.: The passage complained of, when read with its context, was not a misdirection in law, but was in accordance with the established principles. The charge, read as a whole, was not an instruction that the jury should seek to award perfect compensation.

Per HENDERSON J.A., *dissenting*: The passage constituted misdirection in law, and since the jury were bound to accept the trial judge's statement of the law, it must be assumed that they acted honestly in assessing the damages, and that they did so in accordance with these instructions. There must therefore be a new assessment of damages.

AN APPEAL by the defendant from the judgment of Hope J., entered upon the findings of a jury. The facts are sufficiently stated in the reasons for judgment.

5th and 6th December 1944. The appeal was heard by HENDERSON, LAIDLAW and McRUER JJ.A.

T. N. Phelan, K.C., for the defendant, appellant: This appeal is based on four grounds: (1) there was wrongful admission of evidence as to a permanent disability; (2) there was misdirection in the charge of the trial judge to the jury; (3) there is no real evidence of a permanent disability; (4) the view of the jury was biased and mistaken in relation to the evidence.

We are appealing against the finding of the jury as to the amount of the damages; there is no appeal against the finding of liability. The Judicature Act, R.S.O. 1937, c. 100, s. 26, enables us to ask this Court to fix the amount of damages. There is no case which says the appellate Court does not have jurisdiction to fix the damages, and three or four cases say that it does have jurisdiction. There is not a word in the evidence which would justify the amount of damages allowed, nor was there any evidence which would justify the finding of \$5,000

for a permanent disability. The jury took a biased or mistaken view of the whole case: *Deutch v. Martin*, [1943] S.C.R. 366, [1943] 3 D.L.R. 305. The onus is upon the respondent to prove her damages; instead she has proved a hypothetical case of permanent injury. The charge of the trial judge gave the jury a wrong impression of the medical evidence. There was not any factual difference between the doctors' evidence, it was a difference in their conclusions. [HENDERSON J.A.: Your point is that the jury was misdirected and followed that misdirection.] Yes, and under the circumstances, the appellant should not be put to the expense of a new assessment of damages. This Court should exercise its jurisdiction under s. 26 of The Judicature Act, R.S.O. 1937, c. 100.

Once it has been established that misdirection occurred, the onus is upon the respondent to prove that no injustice followed. *Ristow v. Wetstein*, [1934] S.C.R. 128, [1934] 1 D.L.R. 787. The trial judge erred in asking the jury in the circumstances to reassess damages after they had dispersed: *Fletcher v. Thomas*, [1931] O.R. 195 at 200, [1931] 3 D.L.R. 142; *Sheppard v. Macinnis and Canadian Industries Limited*, [1933] O.W.N. 395; *Hudson's Bay Company v. Wyrzykowski*, [1938] S.C.R. 278, [1938] 3 D.L.R. 1.

In charging the jury that "the plaintiff is entitled to recover such sum as will put her in the same position as she was before the accident", the trial judge erred, since this is the standard of perfect compensation, and is not the true measure: *Phillips v. The South Western Railway Company* (1879), 4 Q.B.D. 406; *Rowley v. London and North Western Railway Company* (1873), L.R. 8 Ex. 221; *Roach v. Yates*, [1938] 1 K.B. 256.

The trial judge admitted evidence of damages which would not normally result, without any plea thereof. Such damage is special damage and must be specially pleaded and strictly proved. In tort, special damages are such consequences of an injury as are peculiar to the circumstances and condition of the injured party: 17 *Corpus Juris* 715, note 95.

Justice would not be done in this case by sending it back for a new trial. [HENDERSON J.A.: We must assume that this jury acted honestly and that they did not allow any damages in respect of the suggestion of cancer or other malignant disease. The counsel for respondent need not direct his argument to the question of the reassessment of damages by the jury after they had dispersed.]

D. J. Walker, K.C., for the plaintiff, respondent: The question of damages is one for the jury: *Deutch v. Martin*, [1943] S.C.R. 366 at 369, [1943] 3 D.L.R. 305. Unless it is manifest that the jury has proceeded on a wrong principle in assessing damages, an Appellate Court will not interfere: *Martin v. Deutch*, [1942] O.W.N. 583, [1942] 4 D.L.R. 529. No error in principle was made by the jury in assessing damages in the case at bar. [LAIDLAW J.A.: How can a jury make a proper assessment of damages in law when it has been given a wrong measure? If the trial judge has misdirected the jury in this respect, where in his charge has he corrected it? The onus is upon the respondent to show that there has been no misjustice or substantial miscarriage of justice by reason of this mishap. Would the jury have brought in a verdict of \$5,000 damages if they had been charged to bring in fair compensation, not perfect compensation? The point is a narrow one: after all the evidence of the plaintiff's condition is examined, and deleting any suggestion of cancer, it is your contention that \$5,000 is a reasonable amount?] On the weight of the evidence concerning the injuries suffered, and without giving any consideration whatever to the question of future malignancy, the jury were more than justified in arriving at their verdict. It is a well-established practice of appellate courts not to interfere with the quantum of damages for personal injuries where there has been no error in principle in assessing them.

T. N. Phelan, K.C., in reply: The Court is referred to the case of *Harries Hall & Kruse v. South Sarnia Properties Ltd.*; *South Sarnia Properties Ltd. v. Baird & Baird*, 63 O.L.R. 597, [1929] 2 D.L.R. 821.

Counsel for respondent, at the request of the Court, filed a supplementary memorandum of law dealing with the question of onus, from which the following points are taken:

1. The trial judge did not misdirect the jury. Too much importance must not be given to isolated and detached expressions in the judge's charge: *Holmsted & Langton*, Ontario Judicature Act, 5th ed. 1940, p. 208. In the light of the judge's repeated instructions to the jury to act reasonably, it cannot be urged that the isolated sentences attacked in this charge dominate the reasoning of the charge on the question of damages.

2. Assuming that there has been a misdirection, then the onus is upon the appellant to show that the misdirection may have affected the verdict. This onus is a heavy one for in the words of s. 27(1) of The Judicature Act: "A new trial shall not be granted on the ground of misdirection . . . unless some substantial wrong or miscarriage has been thereby occasioned."

If the appellant satisfies the Court that the misdirection may have resulted in a substantial wrong or miscarriage, then the onus shifts to the respondent to show the Court that the misdirection did not so affect the verdict.

Where the Court, after a careful consideration of the charge, the evidence and the verdict, is still unable to say whether or not the misdirection affected the verdict, the onus on the respondent remains unsatisfied and the verdict must fall: *Anthony v. Halstead* (1877), 37 L.T. 433; *White v. Barnes*, [1914] W.N. 74; *Harnett v. Bond et al.* (1924), 40 T.L.R. 653.

Cur. adv. vult.

27th April 1945. HENDERSON J.A. (*dissenting*):—An appeal from the judgment of the Honourable Mr. Justice Hope in favour of the plaintiff, entered upon the findings of a jury. The appeal is as to the assessment of damages only, which the jury fixed at \$5,514.

On 1st May 1943, the plaintiff was struck from the rear by the defendant's motor vehicle, and received a bruise upon her left buttock and also a slight cut on her elbow. It is not suggested that there was any bone injury. The cut on her left elbow healed promptly, but at the date of the trial, more than a year after the collision, she claimed to be still suffering from the bruise on her left buttock.

On 18th June 1943, the plaintiff gave evidence in police court proceedings. At that time her evidence was that she saw the defendant on the Monday following the collision, and at that time her back was better and she so informed the defendant, and also that she sustained no other injury, except a slight cut on her elbow.

At the trial, in May 1944, her evidence is that there had been continuous soreness and inflammation in her left buttock from the time of the injury, and that she was unable to sit comfortably and had to use a cushion. Further, she said that some eleven years before the collision she had had two operations

when her coccyx was removed, and also a number of growths, and that as a result of the operations she had perfect health from that time onwards, until the injury in question.

The theory was advanced by plaintiff's counsel during the trial, and the suggestion continued throughout the trial, that the bruise on the buttock might produce a malignant disease, the inference being the dread disease called cancer.

Dr. Breuls, whose office is in the same building as the plaintiff's apartment, and who had been attending her up to the time of the trial, refers to a report from the Lockwood Clinic containing some history of the plaintiff, which showed that the Lockwood Clinic removed tissues of which they were suspicious of cancer.

Now, of course, the plaintiff's evidence as to the removal of growths, and this evidence of Dr. Breuls, is purely hearsay and should not have been introduced at all. No medical evidence of any kind was called to substantiate these hearsay statements, but the record is full of allusions to this danger of malignant disease.

Following her injury the plaintiff was first attended by Dr. McPhedran, who was sent by the defendant. Dr. McPhedran ceased to attend the plaintiff on 28th May, and thought that in another month or six weeks she would be well. She was next attended by Dr. Shier, the plaintiff's surgeon, who estimated the condition should heal in from two to six months. For the defendant she was examined by Dr. Brooke, on 8th December 1943, in the presence of Dr. Breuls, and his evidence is that there was no redness or inflammation at that time, and no disability except a slight welt in the skin. Dr. Shier again examined the plaintiff on 29th February 1944, when he found there was inflammation and soreness which he said might persist. On cross-examination Dr. Shier's evidence is that he was not told of Dr. Brooke's examination or finding; also that his conclusions were based on the assumption that there had been continuous inflammation and soreness from the time of the injury; further, that the reference to carcinoma is vague, a matter of pure surmise, and may be eliminated as any reasonable probability of the result of the accident.

The learned trial judge left the issue of damages generally, including the suggestion of malignant disease. The jury retired at 4.10 p.m., and at 5.42 the foreman reported: "I think we can

say we have reached an agreement but we have not signed it.” The jury was asked “to complete your deliberations and seal your verdict” and “to come in to-morrow morning when I will receive your verdict.” In accordance with these instructions the jury returned a sealed verdict to the sheriff and dispersed.

On resuming the following morning, the learned trial judge stated: “I will re-charge the jury . . . that they should not consider the possibility of cancer”, and having been so charged the jury were sent back with a set of questions which were identical with those which they had answered in their sealed verdict.

The questions and answers are as follows:

“1. Has the defendant satisfied you that the injuries to the plaintiff were not caused by the negligence of the defendant?

A. No.

“2. Was the plaintiff guilty of any negligence which caused or contributed to the accident? A. No.

“3. If the answer to No. 2 is ‘Yes’, then state fully in what did such negligence of the plaintiff consist? (Not answered.)

“4. If the answer to No. 1 is ‘No’ and the answer to No. 2 is ‘Yes’, is it practicable for you to apportion the degree of fault as between the defendant and the plaintiff? (Not answered.)

“5. If the answer to No. 4 is ‘Yes’, then state the degree of fault respectively of: (a) the plaintiff %
(b) the defendant % (Not answered.)

100%

“6. Regardless of the degree of fault attributable to the two parties, state the amount at which you assess the *total* damages of the plaintiff? A. \$5,514.00.”

The learned trial judge having straitly charged the jury that they should not allow any damages in respect of any suggested possibility of cancer, we were of opinion upon the argument that the jury, having returned identical answers to the two sets of questions, must be taken to have performed their duty honestly and to have thereby declared in effect that they had not allowed any damages in respect of the suggestion of cancer or other malignant disease, and counsel were so informed at the close of the argument of counsel for the appellant. I was of this opinion then, and am so still.

The learned trial judge did all he could do to cure the effect of the improper suggestions made throughout the trial as to this matter, without any admissible evidence to support them.

There was also continued suggestion throughout the trial that the plaintiff's injury was in the same area as the operation eleven years before, whereas it is quite clear that the bruise on the left buttock is not in the same area as the previous operations or either of them.

The learned trial judge, in the course of his charge, instructed the jury as follows:

"The plaintiff is entitled in a case of this kind to recover by way of damages such compensation as will put her in the same position, so far as money can do so, as she was before the accident happened, put her back in as good a position as though the accident had never happened."

This is misdirection in law and as the jury were instructed, and are bound, to accept the law as stated by the trial judge, we must, by the same token, deem that they acted honestly in assessing the damages and that they did so in accordance with these instructions.

While I view with regret the course of the trial in those respects to which I have referred during the taking of evidence, it is upon this ground that I think there must be a new assessment of damages.

As the defendant is in no way to blame for the abortive trial, the costs of that trial should be costs to the defendant in the cause, and the defendant should have the costs of the appeal.

LAILAW J.A.:—Judgment in favour of the plaintiff was delivered by Hope J. on 19th May 1944, after trial with a jury, and the defendant now appeals against the finding of the jury as to the amount of damages.

The grounds of appeal are shortly stated as follows: (a) there was wrongful admission of evidence; (b) there was no evidence of permanent disability of the plaintiff; (c) the view of the jury was based on mistake or was biased; (d) there was misdirection in the charge to the jury.

The facts may be briefly stated. A motor vehicle driven by the defendant at the intersection of Eglinton Avenue and Bathurst Street in Toronto struck the plaintiff when she was walking from one side of Bathurst Street to the other. She suffered personal injuries.

The jury found that the defendant had not satisfied them that the injuries to the plaintiff were not caused by his negligence; that there was no negligence on the part of the plaintiff; and they assessed the total damages of the plaintiff at the sum of \$5,514.

It was urged by counsel for the appellant that at the trial the theory was advanced by counsel for the plaintiff (and pursued through the evidence) that the injuries suffered by the plaintiff would produce cancer; and that this possible result had not been mentioned in the pleadings or on discovery, or to Dr. Brooke, who, on the defendant's behalf, examined the plaintiff; and that the evidence came to the defence as a complete surprise.

Undoubtedly there were numerous questions put by counsel for the plaintiff which were suggestive and irregular in form. There was, I think, an endeavour to present evidence showing the possibility of consequences not expressly pleaded or stated before trial. In particular many references were made to "cancer".

The learned trial judge left to the jury the issue of damage generally, including the issue of cancer, and counsel for the defendant made the objection that it was the duty of the Court not to leave that issue to them. The objection was not given effect at the time it was made and by reason of the circumstances existing at the trial the jury brought in a sealed verdict. The jury then separated and on the following day, after receiving and perusing the verdict (but without communicating it to counsel), the learned judge decided to recharge them on the subject of cancer. The jury was then instructed in part as follows: "I am instructing you definitely that you exclude from your assessment of damage any matter of cancer if by chance you have already included it in your computation."

The jury retired, and upon their return the amount of damages assessed was made known. It subsequently appeared that the amount of \$5,514 fixed by the jury after the instruction above quoted was the same as the amount of damage assessed by the jury before such instruction from the learned judge.

Upon conclusion of argument of counsel for the appellant the unanimous opinion of the members of the Court on certain points was given. It was decided that the appeal could not succeed on the ground that the jury were asked to re-assess the damages after they had dispersed. It was assumed that

the jury acted honestly and in obedience to the instructions of the learned judge. It follows that no allowance to the plaintiff has been made by the jury by reason of any condition of cancer, past, present or future. It was also the opinion of the Court that certain irregularities appear in the proceedings at trial, *e.g.*, the form of certain questions put by counsel for the plaintiff, certain volunteered statements by witnesses, and possibly the recharging of the jury after it had dispersed, but they did not occasion such substantial wrong or miscarriage as to entitle the appellant to a new trial: The Judicature Act, R.S.O. 1937, c. 100, s. 27(1).

Counsel for the respondent was called on to answer only the argument that the learned trial judge misdirected the jury as follows: "The plaintiff is entitled in a case of this kind to recover by way of damages such compensation as will put her in the same position, so far as money can do so, as she was before the accident happened, put her back in as good a position as though the accident had never happened."

Counsel for the appellant contends that in that language lies a serious and substantial misdirection. He argues that the jury was given a standard of perfect compensation which admittedly is not the true measure of the plaintiff's damages. Standing alone, the part of the charge quoted is incorrect, and I have much doubt as to whether the error was remedied by other parts of the charge. But misdirection is not *per se* a ground upon which a new trial will be ordered. It must appear also that a substantial wrong or miscarriage has been thereby occasioned: The Judicature Act, s. 27(1), *supra*. To determine whether that condition exists it is necessary fully and carefully to consider the verdict, together with the whole charge and evidence. When it is read with the misdirection only, it is not difficult to reach the view that the verdict may have been substantially affected by the error. But a study also of the evidence satisfies me that the same verdict could be reasonably found if the misdirection in the charge had not been given. I have read and re-read the admissible evidence with the object of settling in my mind a reasonable and fair amount for the damages suffered by the plaintiff. I do not discuss the evidence in detail, but these facts appear: The plaintiff is 54 years old. Before the accident she was "a very spry woman". At the date of trial, more than a year after the accident, she was "still suffering a great deal

and doctoring"; the site of the injury was "still very sore and drawing, burning all the time", and she stated, "I am never free of it." She used a rubber ring, prescribed by her physician, to sit on, so as "to keep the pressure of the hard chair off this injured part". Her physician says "If you see her walking now she seems to walk as if she has some of the starch taken out of her." He testified in part as follows: I quote, "In regard to the permanency of this injury which is existent at the present time, what have you to say? A. I believe it is going to persist." I do not quote or refer in detail to evidence given by Dr. Shier, an eminent surgeon, but it may be reasonably concluded that in his opinion the condition of the plaintiff must be considered as a serious one and is not of a minor nature. My judgment is that the sum assessed by the jury is more generous than I would have allowed, but that it is not shocking or extravagant. It is not so unreasonable as to warrant any interference by this Court, and I must hold that no substantial wrong or miscarriage has been occasioned by misdirection in the charge.

For these reasons the appeal ought to be dismissed with costs.

MCRUER J.A.:—With great respect, I am unable to agree that the passage complained of in the learned trial judge's charge, when read with the context, and taken in relation to the whole charge, constitutes a misdirection in law. The learned trial judge opened his discussion of damages by telling the jury, "Remember that I told you the damages are those that are the reasonable and probable sequence of the injury. Keep that constantly in mind when you consider the question of damages." He went on to refer to out-of-pocket expenses, and stated:

"Those are matters which can be computed. It is not always so easy to determine some other matters, particularly when you are looking into the future—almost crystal-gazing.

"If you feel that damages have been suffered as the natural, reasonable and probable consequence of this accident, then the plaintiff is entitled to be reimbursed, to be compensated. It is axiomatic that no court can be perfect in measuring damages with exact precision."

He then went on to point out to the jury that neither the plaintiff nor the defendant could come back again for any reconsideration of the amount awarded, following which he stated:

"Therefore, it behooves you and me, in trying to do justice between the litigants, to consider matters most carefully. We want to be fair. We do not want to give too much, more than the situation warrants, but, after all, we do not want to give too little if the situation demands a larger amount *in all fairness*." Then follows the passage which, it is alleged, constitutes a misdirection in law—

"The plaintiff is entitled in a case of this kind to recover by way of damages such compensation as will put her in the same position, so far as money can do so, as she was before the accident happened, put her back in as good a position as though the accident had never happened.

"You are entitled to consider in weighing those damages her out-of-pocket expenses. Those have been listed at \$514." Several pages of discussion of out-of-pocket expenses follow.

The language used, taken in its context, conveys to the jury the same guiding principles that are laid down in text-books and decided cases.

In *Mayne on Damages*, 10th ed. 1927, p. 9, it is stated:

"The theory of damages is, that they are to be a compensation and satisfaction for the injury sustained, that is, that the sum of money to be given for reparation of the damage suffered should, as nearly as possible, be the sum which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is getting damages."

In 10 *Halsbury*, 2nd ed. 1933, p. 119, the learned author uses these words:

"By the measure of damages is meant the standard or method of calculation by which the amount of damages is to be assessed, and the damages due either for breach of contract or for tort are such as will, so far as money can compensate, give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act."

Lord Blackburn, in *Livingstone v. The Rawyards Coal Company* (1880), 5 App. Cas. 25, at p. 39, states:

"I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would

have been in if he had not sustained the wrong for which he is now getting his compensation or reparation." Lord Blackburn then proceeds to qualify this statement by reference to those cases where exemplary damages might be awarded.

In *Porteous v. Chotem*, 13 Sask. L.R. 209, [1920] 2 W.W.R. 1, 51 D.L.R. 507, Mr. Justice Lamont, in delivering the judgment of the Court of Appeal of Saskatchewan, lays down the principle in these words:

"The underlying principle upon which Courts proceed in awarding damages in actions for torts is to place the injured person in the same situation, so far as money can do it, as he would have been in had the occurrence which affected him adversely not taken place."

In *The Argentino* (1888), 13 P.D. 191, at p. 200, Bowen L.J. says:

"Speaking generally as to all wrongful acts whatever arising out of tort or breach of contract, the English law only adopts the principle of *restitutio in integrum*, subject to the qualification or restriction that the damages must not be too remote, that they must be, in other words, such damages as flow directly and in the usual course of things from the wrongful act." Lord Esher M.R., in the same case, makes reference to the language of Dr. Lushington in *The Columbus* (1849), 3 Wm. Rob. 158, 162, 166 E.R. 922, where the following rule is laid down:

"As a general proposition, undoubtedly the principle in question is correctly stated; and not only in this Court, but in all other Courts, I apprehend the general rule of law is, that where an injury is committed by one individual to another, either by himself or his servant, for whose acts the law makes him responsible, the party receiving the injury is entitled to an indemnity for the same." In adopting the principle of *restitutio in integrum*, Lord Esher goes on to point out that this rule is, of course, subordinate to the rule as to remoteness. "It is a rule as to the measure of a damage which is allowed; it does not deal with a damage which cannot be allowed."

Counsel for the appellant argues that the learned trial judge really invited the jury to award "perfect compensation", and that this amounted to an error in law. He relies on *Phillips v. The South Western Railway Company* (1879), 4 Q.B.D. 406; *Rowley v. London and North Western Railway Company* (1873), L.R. 8 Ex. 221; and *Roach v. Yates*, [1938] 1 K.B. 256.

The learned trial judge's charge, read as a whole, is not, in my opinion, an instruction that could reasonably be interpreted by the jury as a direction to seek to award that sort of perfect compensation that is dealt with in the cases relied upon. The principle under discussion in these cases arises out of the following language used by Brett J. in *Rowley v. London and North Western Ry. Co.*, *supra*, at p. 230:

"This seems to be in accordance with the general rule, that in actions for tort for personal injury the amount of damages is entirely in the disposition of the jury subject to supervision by the superior court of law, if unreasonably large or unreasonably inadequate. To the best of my belief, the invariable direction to juries, from the time of the cases I have cited until now, has been 'that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, *under all the circumstances, a fair compensation*'. I have a clear conviction that any verdict founded on the idea of giving damages to *the utmost amount* which would be an equivalent for the pecuniary injury, would be unjust." (The latter italics are mine).

It must not be overlooked that this language applied to a case arising under The Fatal Accidents Act, and the question at issue was whether it was open to the jury to award a sum that would amount to the present worth of an annuity for the joint lives of the plaintiff and the deceased, so as to provide an income equal to the pecuniary loss. Just prior to the paragraph above quoted, Brett J. quotes a passage from *Armsworth v. The South-eastern Railway Company* (1847), 11 Jur. 758, as follows:

" . . . it would be most unjust if whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done . . . Scarcely any sum could compensate a labouring man for the loss of a limb, yet you don't in such a case give him enough to maintain him for life . . . you are not to consider the value of existence as if you were bargaining with an annuity office . . . I . . . advise you to take a reasonable view of the case and give what you consider a fair compensation."

In *Roach v. Yates*, *supra*, Greer L.J., at p. 266, after referring to *Rowley v. London and North Western Ry. Co.* and *Phillips v. The South Western Ry. Co.*, states:

" . . . we have not to give what will be an absolute and perfect compensation for all the injuries which the unfortunate plaintiff in this case has suffered. We are not to give him as damages the price that he would have accepted in exchange for the life he preferred to go on living."

See also *Johnston v. Great Western Railway Company*, [1904] 2 K.B. 250.

As I read all these cases, on the one hand the jury are not to be instructed that they may be at liberty to award such a sum as will be an assurance that the plaintiff will suffer no possible loss from the injuries sustained, but on the other hand the jury may award the plaintiff a sum which, in the words of Lord Blackburn, will "put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong."

In arriving at such a sum a jury must necessarily take into consideration the contingencies of the future as emphasized in *Johnston v. Great Western Railway Company*, *supra*. There is nothing in the learned trial judge's charge that will exclude the consideration of such contingencies. The jury were impressed with the fact that they must not take into account things that might not occur. An instruction to endeavour to arrive at a compensaion that would put the plaintiff in the "same position, so far as money can do so, as she was before the accident happened" is not, in my view, when given generally and not in respect of the specific matter of income as in *Johnston v. Great Western Railway Company*, an instruction to disregard the contingencies of the future, but in fact an instruction to have regard to them, otherwise it would amount to an instruction to put the plaintiff in a better position than she was before the accident.

The learned trial judge made it amply clear to the jury that in considering the amount to be awarded they must be fair and just. The charge cannot be interpreted as an instruction to give "the utmost amount which would be an equivalent for the pecuniary injury" or that the damages were to be "the price that she would have accepted in exchange for the life she preferred to go on living" had the accident not happened.

The criticized passage immediately precedes the discussion of the out-of-pocket expenses, and can be fairly read as introductory to that discussion. The words immediately following it are: "You are entitled to consider in weighing those damages

her out-of-pocket expenses", meaning the "compensation . . . [which] will put her in the same position . . . as she was before the accident happened." There is no doubt that the plaintiff was entitled to full compensation for her out-of-pocket expenses necessarily and fairly incurred.

Some portions of the charge could have been more aptly phrased, and no doubt would have been more aptly phrased had the learned judge been preparing a written judgment, but it is not the function of an appellate Court to separate a single sentence from its context in a charge to the jury and deduce from it a particular meaning, unless that sentence dominates the reasoning of that portion of the charge: *Blue & Deschamps v. Red Mountain Railway Company*, [1909] A.C. 361 at 368, C.R. [1909] A.C. 210, 9 C.R.C. 140. With utmost respect, I am convinced that the charge, taken as a whole, does not contain any error in law that would justify setting aside the verdict of the jury.

The amount of the damages as assessed is generous, but there is ample evidence, and particularly medical evidence, that supports the conclusion, apparently arrived at by the jury, that the plaintiff has suffered serious injuries that in all likelihood will be permanent. I am, therefore, unable to find that the verdict of the jury can be interfered with by the Court of Appeal. I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs, HENDERSON J.A. dissenting.

Solicitor for the plaintiff, respondent: David James Walker, Toronto.

Solicitors for the defendant, appellant: Phelan, Richardson, O'Brien & Phelan, Toronto.

[HOGG J.]

Greenlees v. Attorney General for Canada.

War Measures—Compulsory Military Training—Exemptions—“Minister of a Religious Denomination”—Jehovah’s Witnesses—The National Selective Service Mobilization Regulations, 1944, ss. 2(f), 3(2)(c).

A member of the group of persons known as “Jehovah’s Witnesses” is not a “minister of a religious denomination”, within the meaning of s. 3(2)(c) of The National Selective Service Mobilization Regulations, 1944, and is therefore not exempt from the operation of the Regulations.

Crown—Prerogatives—Action against Attorney General for Canada for Declaratory Judgment—Jurisdiction of Courts—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 18, 19—The Petition of Right Act, R.S.C. 1927, c. 158, s. 2(c)—Exchequer Court Rules, Rule 6—The Judicature Act, R.S.O. 1937, c. 100, s. 15(b).

The Supreme Court of Ontario has jurisdiction to entertain an action against the Attorney General for Canada, representing the Crown, in which a subject seeks a declaratory judgment affecting the rights of the Crown only indirectly.

AN ACTION for a declaration. The facts, and the nature of the declaration sought, are fully stated in the reasons for judgment.

14th and 15th November 1944 and 21st February 1945. The action was tried by HOGG J., without a jury at Toronto.

J. L. Cohen, K.C., and W. Glen How, for the plaintiff.

J. J. Robinette, K.C., for the defendant.

27th April 1945. HOGG J.: On the 4th March 1944, an order, P.C. 1355 ([1944] 1 C.W.O.R. 566), was passed by the Governor-General in Council under the authority of The War Measures Act, R.S.C. 1927, c. 206, and The National Resources Mobilization Act, 1940 (Dom.), c. 13, entitled “The National Selective Service Mobilization Regulations 1944”, providing, *inter alia*, for the selection of men for military training. Section 3(1) of the Regulations reads as follows:

“These regulations shall apply to such age classes or parts of age classes of men as the Governor in Council may, from time to time, by proclamation in the *Canada Gazette* designate for the purpose.”

Subs. 2(c) provides:

“2. Notwithstanding subsection one, these regulations shall not apply to the following:

(c) A regular clergyman or a minister of a religious denomination”.

“Designated” is defined by s. 2(f), and “when used with reference to any man, [it] means that he is a man to whom these

regulations apply and that he belongs to an age class or part of an age class that has been designated”.

It is admitted that on the 1st September 1944 the plaintiff was ordered to report on the 13th September 1944, “to be dealt with in accordance with the Orders and Regulations of or relating to the Department of National Defence”, and to submit to a medical examination.

On the 29th January 1943 the plaintiff furnished certain information pursuant to the Regulations and subsequently, on the 28th May 1943, he answered in writing certain questions with reference to his physical condition; he was examined by a physician and certified to be in category “A”. On the 29th May 1943, in a letter to the Registrar of National Selective Service, Toronto, the plaintiff stated that he was a minister of the gospel, and, as such, claimed total exemption from military service or other service which would interfere with his ministerial duties. On the 7th June 1944, the plaintiff was requested by letter from the Divisional Registrar to present himself before the Mobilization Board for a hearing. To this request the plaintiff replied that, by reason of s. 3(2) (c) of the Regulations, he did not come within the jurisdiction of the Board, and subsequently by letter of the 17th June from the Divisional Registrar, the plaintiff was informed that unless he gave reasons at once for his failure to comply with the instructions given him, action would be taken in accordance with the aforesaid Regulations.

The next step in the matter was the institution of this action on the 28th June 1944. By para. 3 of the plaintiff’s statement of claim, it is alleged that the plaintiff is, and at all times material to the action was, “a minister of a religious denomination, to wit, Jehovah’s Witnesses, within the meaning of Regulation 3(2) (c) of The National Selective Service Mobilization Regulations”. The plaintiff further alleges that, although by reason of his occupation and calling, the Regulations do not apply to him, nor is he a designated person thereunder, he was ordered to report for medical examination, and was required to report for compulsory military training. The plaintiff claims: (1) a declaration that he is a minister of a religious denomination within the meaning of the aforesaid Regulations; (2) a declaration that the Regulations, save as to the said section 3(2) (c), do not apply to the plaintiff; (3) a declaration that the notices received by the plaintiff to

report for medical examination, and for military training, are *ultra vires* and not binding upon the plaintiff; and (4) a declaration that any order, direction or proceeding affecting the plaintiff, and purporting to be made under the authority of the said Regulations, is illegal and *ultra vires*.

The defendant pleads that the plaintiff's statement of claim shows no cause of action and that on the facts as pleaded by the plaintiff a declaratory judgment against the Crown ought not to be given.

The two concrete issues of fact raised in this action are, whether the plaintiff is a regular clergyman or a minister of a body of persons calling themselves, or known by the name of, "Jehovah's Witnesses", and whether such body of persons constitutes a religious denomination. The defence falls into two categories, one directed to the merits of the plaintiff's allegations, the other being one of law and of procedure.

I am in agreement with counsel for both parties that the matters of fact in issue should be considered, and that judgment should not be given solely upon the matters of law raised by the defence—assuming that it should be held that the plea of the defendant in that respect should be sustained.

Mr. Percy Chapman, who gave evidence on behalf of the plaintiff, has been associated since the year 1919 with Jehovah's Witnesses, and is the head of this group of persons in Canada. He described his position as that of superintendent of ministers and evangelists. Mr. Hayden C. Covington, a member of Jehovah's Witnesses who resides in the city of Brooklyn in the State of New York, also gave evidence for the plaintiff. He is vice-president of two corporations, one called the Watch Tower Bible and Tract Society, incorporated under the laws of the State of Pennsylvania, and the other the Watchtower Bible and Tract Society, incorporated in the State of New York. The first-named corporation is intimately connected with the affairs in Canada of Jehovah's Witnesses. The evidence given by these two gentlemen presents a general picture of the beliefs and the activities of Jehovah's Witnesses and of their relationship to the aforesaid Watch Tower Bible and Tract Society. The group of persons known under this name have no written constitution or written form of organization setting out their purposes and governing their actions, but the evidence is to the effect that the Bible is

considered to be the constitution of Jehovah's Witnesses. A book, called "The 1941 Year Book of Jehovah's Witnesses", put in evidence by the plaintiff and published by the Watch Tower Bible and Tract Society, states at p. 16, "... it is the prerogative solely of Jehovah God to select and organize his own witnesses ... no man has any authority whatsoever to select or organize them."

The Watch Tower Bible and Tract Society of Pennsylvania has a membership of some 10,000 persons, who elect seven directors, and these seven individuals direct the activities and work of, and fix and determine the policies to be followed by, Jehovah's Witnesses throughout the world, except, apparently, in Great Britain; they appoint and ordain ministers and officers for certain territories and duties, supervise their work, and remove them from office when that step is necessary. Mr. Covington testified that Mr. N. H. Knorr, president of the Watch Tower Bible and Tract Society, directs the affairs of Jehovah's Witnesses in Canada through Mr. Chapman. That gentleman was appointed in the year 1936 and given authority by the aforesaid directors to appoint and ordain ministers of Jehovah's Witnesses in this country and to direct the work of the members. To use Mr. Chapman's own words: "These seven in Brooklyn, Jehovah's Witnesses leaders, have appointed myself to be the representative of that body to direct the affairs of Jehovah's Witnesses in Canada."

The evidence as to the creation and the structure of the "governing body" of Jehovah's Witnesses, referred to by Mr. Chapman and Mr. Covington, is vague, and, I think it may fairly be held upon the evidence that this body is in reality the president and directors of the Watch Tower Bible and Tract Society, of Pennsylvania, who may consult with, and request the advice of, certain other members of Jehovah's Witnesses residing at the headquarters of the Watch Tower Society, which is situated in Brooklyn.

A third corporation, under the name International Bible Students Society, holds certain property for Jehovah's Witnesses in Canada. In Great Britain a corporation bearing this name apparently occupies the same position towards Jehovah's Witnesses there as does the Watch Tower Bible and Tract Society of Pennsylvania to the Canadian members.

I have come to the conclusion that Jehovah's Witnesses are not an organized body in the ordinary sense of the term, but are a group of persons, all of whose policies, work and activities are directed and controlled by the directors of the Watch Tower Bible and Tract Society, who are not responsible to the members of Jehovah's Witnesses or to the congregations of such members. There has not been placed in evidence the charter, articles of association, or memorandum by which the Watch Tower Bible and Tract Society was incorporated, setting out the objects or the purposes or powers of that society.

Jehovah's Witnesses consider the term "religion" as the opposite of the word "Christianity", and do not use this word as signifying the practice of Christianity or Christian principles. It is made very clear in the 1941 Year Book that Jehovah's Witnesses do not consider that they are a "religious" body or denomination, but it is contended on behalf of the plaintiff that, although this may be manifest, nevertheless Jehovah's Witnesses are a group which must be held to be a "religious denomination" within the plain and ordinary meaning of the language of the Regulation, and that the term "religious denomination", according to the meaning which must be given to this phrase in the Regulation, embraces and includes a group having the attributes of Jehovah's Witnesses. It is also urged by counsel for the plaintiff that the fact that the Jehovah's Witnesses deny that they are a religious body or a religious denomination and place a limited meaning on the word "religion" for their own special purposes, cannot alter or affect their status if as a fact they are what is ordinarily and commonly termed a religious denomination.

Jehovah's Witnesses adhere to, and preach, certain doctrines believed by them to be founded upon and derived from the Bible, that seem to be entirely distinct from those held by other bodies of Christians, or by any of the well-known Christian religions, as for example, the belief that the resurrection will take place within the generation of those living in the year 1914, and also that the soul is not immortal. The teaching of the gospel is not carried on by Jehovah's Witnesses in the manner common to most of the Christian religious denominations, that is to say, by means of services conducted in churches, but by going from house to house in direct contact with the people.

It is the literal, ordinary meaning, the meaning to be derived when the language used is considered in its popular sense, that is, in general, to be regarded in an endeavour to ascertain the meaning of the language of a statute or of a regulation made pursuant to a statute. In *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575 at 582, C.R. [9] A.C. 296, 4 Cart. 7, (referred to by Duff J. in *Smith v. The Attorney General of Ontario*, [1924] S.C.R. 331, [1924] 3 D.L.R. 189, 42 C.C.C. 215), Lord Hobhouse, speaking for the Privy Council, said: "... the common understanding of men . . . is one main clue to the meaning of the legislature."

The Oxford Dictionary gives as one of its definitions of the word "religion", "a particular system of faith and worship." "Denomination" is defined as "a collection of individuals classed together under the same name; now almost always a religious sect or body having a common faith and organization, and designated by a distinctive name."

Although Jehovah's Witnesses as a group or body have no organization as that term is ordinarily used, but are controlled and have their functions and activities directed by the directors of the Watch Tower Bible and Tract Society, and although they claim not to be a religious sect, nevertheless I think the evidence shows that they are a group which, inasmuch as they appear to have a particular system of faith or belief, might be said to come within the ordinary and general conception of the term "religious denomination". It has not been necessary for me to determine this particular matter of fact.

Referring again to the evidence given by Mr. Chapman and Mr. Covington, Jehovah's Witnesses are a society of ministers and every member is an ordained minister. Mr. Chapman said: "Those who are really Jehovah's Witnesses must be ministers. They cannot be anything else." Every member must, for part of his or her time, preach the gospel from house to house, and all members do missionary work. A certain number who wish to devote all of their time to spreading the gospel are known as pioneer ministers. They are appointed to this office in Canada by Mr. Chapman by virtue of the authority conferred on him by the president and directors of the Watch Tower Bible and Tract Society. There is no ceremony attached to the appointing of a pioneer minister. He receives merely a letter of appointment.

In the 1941 Year Book, already referred to, it is said at p. 24: "To be ordained means to be appointed by the proper authority to a position or office to perform the duties specifically assigned."

Those members who have been appointed pioneer ministers go among the people of a district, ascertaining who may be interested in learning of the beliefs and doctrines of Jehovah's Witnesses and conducting with such persons a study of the Bible and of the books and publications sent out by the Watch Tower Bible and Tract Society. Other members of Jehovah's Witnesses are appointed to an office known as "company servant" or "presiding elder". These individuals may devote only part of their time to the work of Jehovah's Witnesses. At intervals what is termed an ordination ceremony is arranged for those who wish to become members of Jehovah's Witnesses, at which the company servant conducts an examination of the candidates, and, if he is satisfied with their knowledge regarding the questions put to them, a ceremony of immersion in water is performed. Such persons are then members or ministers, the terms being synonymous. There are, according to Mr. Chapman, fifty members of Jehovah's Witnesses who devote all their time to administrative work and to spreading the gospel in the city of Toronto. Jehovah's Witnesses do not have churches as known to other denominations. The members go from house to house and in this manner a congregation of individual members is formed, although such members may never gather together.

According to the 1941 Year Book of Jehovah's Witnesses, the Watch Tower Bible and Tract Society keeps a list of persons who are "made the special representatives of the Society and to whom is assigned specific work." The Year Book further states, "They have received the divine ordination or commission of authority from Jehovah God", and have been appointed by the society as ministers to carry out certain duties assigned to them.

Upon coming to Canada from Scotland, the plaintiff was ordained by a travelling representative of Jehovah's Witnesses in the year 1932, at North Bay, Ontario, and determined to devote all his time to the activities of this body. He stated that he became a minister in the same manner as every other member of Jehovah's Witnesses became a minister. No credentials, certificate or written confirmation that the plaintiff was ordained was received by him at the time. He preached the gospel from

house to house in North Bay, and came to Toronto in 1936. He then went to Hamilton, where he was appointed a company servant in 1938, and afterwards came back to Toronto. Subsequent to his coming to Toronto he was appointed company servant to the Bathurst Unit or congregation. He presides at meetings of Jehovah's Witnesses, prepares the work for such meetings in connection with the Bathurst Unit and for the studies to be carried on by those who are members or who wish to become members, conducts funeral services and the services when candidates are accepted as members, and takes part in the administrative work at the headquarters of the group in Toronto. He also from time to time gives addresses to public meetings. He states he received a letter, which he has since lost, from the president of the Watch Tower Bible and Tract Society which purported to appoint him as a full time minister to represent that society, and his name appears in the 1937 Year Book in a list of "ordained representatives".

On the 1st January 1944 the plaintiff received a document entitled a certificate, purporting to be signed on behalf of Jehovah's Witnesses in Canada by Mr. Chapman, to the effect that the plaintiff was in 1932 ordained a minister at a "Consecration Ceremony". On the 15th January 1944, a document in the form of a letter addressed to the Company of Jehovah's Witnesses at Bathurst Unit, Toronto, and signed "Jehovah's Witnesses, Canadian office" announces certain appointments having been made to serve the company. The plaintiff's name appears as having been appointed "company servant".

Several cases before the courts in England, Scotland, several Provinces of the Dominion, in Australia and in the United States of America, were cited by counsel, in some of which the meaning of the term a regular minister, or a minister of a religious denomination, was considered. As in most of these cases the evidence is not fully reported or referred to, and as the decisions arrived at are based entirely upon the evidence given in each case, they are not altogether helpful.

In *Kipps v. Lane* (1917), 86 L.J.K.B. 735, the question came before the Court upon a stated case as to whether a member of the International Bible Students' Association, claiming exemption from military service under the Military Service Act, 1916, was a regular minister of a religious denomination. Viscount Reading C.J. said, at pp. 737-8:

" . . . I have come to the conclusion that I cannot, as a matter of law, say that there was no evidence upon which the Justices could conclude that the appellant, in the circumstances stated, was not a regular minister. I am not sure that he was a minister at all in one sense, and perhaps the strict sense, of the word . . . The mere fact that he was engaged in other work for the purpose of earning his living, but otherwise performed the ministrations of an elder of this congregation, certainly would not, in my judgment, preclude him from being a regular minister; but it is a circumstance in conjunction with a number of others This is a case which goes very near the line"

In *Offord v. Hiscock* (1917), 86 L.J.K.B. 941, upon the evidence present upon an appeal, the decision in *Kipps v. Lane* was followed, but the facts were very different from those of the present case.

In *Flint v. Courthope* (1918), 87 L.J.K.B. 504, the appellant was an evangelist of the Evangelisation Society, the object of which was to spread knowledge of the gospel without regard to denominational distinctions, and the members of which did not class themselves as a denomination. Darling J. said that there was evidence on which the magistrates could find that the society was not a religious denomination, but something outside all denominations, the object of which was to embrace those who belonged to denominations, also that it might be concluded on the evidence that the appellant was not a minister or a regular minister, even if they thought he was a minister.

Saltmarsh v. Adair, [1942] S.C. (J.) 58, was a case that had much in common with the one now under consideration, and which came before the Court of Justiciary in Scotland. The appellant Saltmarsh was a member of a congregation of Jehovah's Witnesses, and was charged in the Sheriff Court at Glasgow that being a person registered in terms of the National Service Acts, 1939 to 1941, and having been served with notice requiring that he submit himself for medical examination by a medical board, he had failed to do so. The Sheriff-substitute (Guild) convicted him and ordered him to be detained for medical examination. At the request of the accused he stated a case for appeal to the High Court of Justiciary, stating the appellant's claim that he was a regular minister of a religious denomination, viz., the International Bible Students Association. The facts

given in evidence are quite fully reported and are in the main similar to those presented in the case at bar, with the exception that the International Bible Students Association performed, with reference to Jehovah's Witnesses, the functions of appointment and supervision undertaken in the present case by the Watch Tower Bible and Tract Society.

The Lord Justice-General (Normand), at p. 64, said:

"The only appointment to which he [the appellant] refers as entitling him to perform spiritual duties, conduct religious services, administer sacraments and the like, depends upon a personal appointment signed by one of the directors of the unlimited company, but there is nothing to show that the grantor of that document was authorised by the congregations, or by anybody representing the congregations, to appoint or ordain ministers. . . .

"The appointment by the unlimited company, therefore, was not that of a regular minister within this denomination, and there was no such thing as a regular ministry of the denomination. It was not a permanent appointment; it was merely an appointment terminable at the will of the body which appointed him, and that was an unlimited company. It was not a spiritual appointment, but merely a secular appointment as a servant of that company."

Lord Moncrieff stated that he might have been prepared to assume that the congregations in their aggregate formed a religious denomination. But he said, at p. 65:

"I do not, however, require to decide this point, seeing that no appointment was in fact conferred upon the appellant, whether to act as minister or to perform any other service, either by the congregations in their aggregate or by any individual congregation. . . . In so far as the appellant may be supposed to have exercised ministerial functions, these were, accordingly, not exercised by him as holder of any office conferred by these congregations which purported to qualify him to act as the regular minister of a religious denomination. . . .

"It is from this unlimited company alone, however, that the appellant draws his sole appointment. It is an appointment which no doubt appears to be exercised by him with the consent of certain of the individual congregations as authorising the performance of certain duties which in another body would only be performed by ordained ministers. That single fact *per*

se, however, whether in view of the limited source of the appointment or on any other view, could never be sufficient to constitute a regular minister."

In *Rex v. Stewart*, [1944] 2 W.W.R. 86, [1944] 3 D.L.R. 331, 81 C.C.C. 349, the Court of Appeal in British Columbia followed the *Saltmarsh* case.

The appeal of *Murdock v. Pennsylvania* (1943), 319 U.S. 105, in the Supreme Court of the United States, was referred to by counsel for the plaintiff in support of the plaintiff's plea, but I cannot conclude that the judgment in this case is in any way applicable to the present issue. It was there held that a municipal licence tax, as a condition of the right of a member of Jehovah's Witnesses to distribute religious tracts and literature from house to house, was invalid under the United States Constitution as a denial of freedom of speech, press and religion. No such question as the denial of freedom of speech or worship is in issue in the case at bar.

Counsel for the plaintiff referred also to the case of *Adelaide Company of Jehovah's Witnesses Incorporated v. The Commonwealth* (1943), 67 C.L.R. 116. An order-in-council under the authority of the National Security (Subversive Associations) Regulations, declared certain bodies, including the Adelaide Company of Jehovah's Witnesses Incorporated, to be organizations or associations of persons prejudicial to the defence of the Commonwealth. An officer of the Government took possession of the plaintiff's hall and action was brought against the Commonwealth claiming an injunction and other relief. Section 116 of the Constitution of the Commonwealth provides, *inter alia*, that no law shall be made prohibiting the free exercise of any religion. The judgment is concerned with the question whether this section of the Constitution was infringed by the Regulations, and it was held that the section was not so infringed. This case is applicable to the one now under consideration only to the extent that the Court apparently considered Jehovah's Witnesses as being composed of persons who constituted a religious body.

In a consideration of the question whether the plaintiff is a "minister", there is one fact which seems to me to be of much importance. To become a member of Jehovah's Witnesses is to become a minister of that body.

All individual members have the duty cast upon them of performing certain functions, each one for part of his or her

time at least, that may be called ministerial duties. It is made very clear in the evidence of Mr. Chapman that the only ceremony performed that is called one of ordination, is that carried out when an individual is made a member of the body. At the one time every person who becomes a member also becomes a minister. This circumstance, in my opinion, is entirely contrary to the conception of one who can be termed a minister of a religious denomination.

The word "minister", as used by Jehovah's Witnesses, is, I think, descriptive of the activities or duties which every member is called upon to carry out to some extent at least, and the word does not denote a special status, such as is held by a minister of a religious denomination. It is this status which, in my view, constitutes a minister as contemplated by the Regulations.

The evidence shows that the body of Jehovah's Witnesses as such, or the congregations of its members, have no part in the appointment of pioneer ministers, company servants or other officers, whether spiritual or otherwise. All such appointments are made by an incorporated company located in Brooklyn, or by those delegated by this company, namely, the Watch Tower Bible and Tract Society, to make such appointments. The plaintiff was so appointed to the office of company servant by Mr. Chapman under the authority that gentleman received from the Watch Tower Association.

These circumstances distinguish the plaintiff from what, in my view, is meant by the term "minister".

I think that, to a large extent, the reasons expressed by the judges in the *Saltmarsh* case are applicable to the facts presented in evidence before me.

My conclusion is that the plaintiff is not a minister within the meaning of that term in the Regulations.

In view of the fact that I have disposed of the claims of the plaintiff upon the facts, adversely to his contention, it would be sufficient to assume that the Court has the necessary jurisdiction and is empowered to entertain the action as it is framed. However, the point is one that has come before the courts in the past without its determination having been necessary, and as it is one which must of necessity be the subject of judicial pronouncement at some time, I have decided to express my view upon the question of law raised by the pleadings.

In so far as the principles of law or of procedure involved in this action are concerned, the right to claim a declaratory judgment is the subject of s. 15(b) of The Judicature Act, R.S.O. 1937, c. 100. This section gives jurisdiction to the Court to make a binding declaration of right, whether any consequential relief is, or could be, claimed or not.

In *Ruislip-Northwood Urban District Council v. Lee et al.* (1931), 145 L.T. 208, it was held that Order 25, Rule 5 (which is identical in its language with s. 15(b) of the Ontario Judicature Act) must be read in its ordinary and natural meaning. A declaratory judgment may be given although no consequential relief is granted.

The jurisdiction conferred is discretionary. See also *Stewart v. Guibord et al.* (1903), 6 O.L.R. 262, and *Stoddart v. Town of Owen Sound* (1912), 27 O.L.R. 221, 8 D.L.R. 932.

One of the prerogatives of the Crown is that at common law a writ will not lie against the Crown at the suit of a subject. The late Mr. Justice Audette of the Exchequer Court of Canada, in his work on the Practice of that Court, 2nd ed. 1909, p. 73, said: "Proceeding by writ against the Sovereign would certainly be an anomaly today, but the question is really of small moment, as it is conceded by all our jurists that however wide the Sovereign's liability to the subject is or may hereafter be made, the proper and becoming remedy must always be the petition of right."

It is true that where the interests of the Crown are affected directly, a subject must bring suit against the Crown by petition of right, but there exists a restricted class of cases where a merely declaratory judgment is sought which only indirectly affects the interests of the Crown, in which an action by writ against the Attorney-General representing the Crown may be instituted by a subject. The well-known case of *Dyson v. Attorney-General*, [1911] 1 K.B. 410, in the Court of Appeal, is authority for this principle of procedure, and counsel for the plaintiff contends that the present action falls within this principle. In the *Dyson* case, action was brought against the Attorney-General to test the validity of a certain notice issued by the Commissioners of Inland Revenue under The Finance Act, 1910, and the main question in issue was whether the Attorney-General could properly be made a defendant in such an action. The plaintiff's claim was for a declaration that he

need not comply with the provisions of the notice, which required the plaintiff to deliver the returns called for within thirty days, under a penalty. Cozens-Hardy M.R. said, at p. 415: "It has been settled for centuries that in the Court of Chancery the Attorney-General might in some cases be sued as a defendant as representing the Crown, and that in such a suit relief could be given against the Crown." And again, at p. 417: "The Court is not bound to make a mere declaratory judgment, and in the exercise of its discretion will have regard to all the circumstances of the case. . . . In my opinion the plaintiff may assert his rights in an action against the Attorney-General and is not bound to proceed by petition of right." Farwell L.J., at p. 421, said: "In a case like the present the Attorney-General is properly made defendant. It has been settled law for centuries that in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right, because the Court cannot make a direct order against the Crown to convey its estate without the permission of the Crown, but when the interests of the Crown are only indirectly affected the Courts of Equity, whether the Court of Chancery or the Exchequer on its equity side, . . . could and did make declarations and orders which did affect the rights of the Crown." At p. 422, the same learned Lord Justice said: "The present is not a case for a petition of right at all; the Crown is not directly affected, but the plaintiff seeks a declaration from the Court of the true construction of an Act which imposes burdensome and expensive inquiries upon him, and for non-compliance with which he is threatened with fines. . . . But the Court is not bound to make declaratory orders and would refuse to do so unless in proper cases."

The question of procedure was considered by the Judicial Committee of the Privy Council in *Esquimalt and Nanaimo Railway Company v. Wilson et al.*, [1920] A.C. 358, 50 D.L.R. 371, [1919] 3 W.W.R. 961. The headnote to the report sets out that when an action, if successful, will affect rights claimed by the Crown, but the plaintiff has against the Crown no claim to which the procedure by petition of right is applicable, the Attorney-General is a necessary and proper party and may be joined as a defendant by the plaintiff. Lord Buckmaster, at p. 363, said: ". . . their Lordships are clearly of opinion that the Attorney-General ought to be before the Court. It is quite true

that the title of the Crown to the land in question is not in controversy, nor is the Crown asked to do any act or grant any estate or privilege; but in the event of the plaintiff's success, the rights existing in the Crown and consequent upon the grant to the respondents will cease." Again, at p. 364: "With regard to the second point, in their Lordships' opinion this is not a case to which procedure by petition of right is properly applicable. . . . In the Province of British Columbia the proceeding is regulated by the Crown Procedure Act of 1897 (R.S.B.C. 1911, c. 63). An examination of this will, in their Lordships' opinion, show that procedure by petition of right is inapplicable. In that statute the 'relief' is defined as a species of relief claimed or prayed for in any petition of right, whether a restitution of any corporal right or a return of lands or chattels or a payment of money or damages or otherwise, following the old principles by which a petition of right has always been regulated."

Another case in point is that of *Smith v. Attorney-General of Ontario*, *supra*. The appellant Smith, who resided in Ontario, gave an order to a firm in Montreal to send him a quantity of intoxicating liquor. The firm refused the order on the ground that by filling it The Ontario Temperance Act would be violated and Smith brought action against the Attorney-General of Ontario, asking for judgment declaring that Part IV of The Ontario Temperance Act was not in force in the Province of Ontario. It was held that Smith had no status to maintain such an action. The appellant relied upon *Dyson v. Attorney-General*, and the cases which followed it, in support of the proposition that, under the circumstances, the appellant had a right to ask for a judicial declaration on the point in dispute. Duff J. (afterwards C.J.C.), in discussing the *Dyson* case and the authorities following it, said that there was no decision upon a hypothetical state of facts and he was of the opinion that an individual had no status to maintain an action restraining a wrongful violation of a public right unless he was exceptionally prejudiced by the wrongful act, but he was also of the opinion that the question was an arguable one and the Court was loath to give judgment against the appellant solely based upon a fairly disputable point of procedure.

It was argued by counsel for the Attorney General for Canada that the action does not lie in this Court, but can be in-

stituted, if at all, only in the Exchequer Court of Canada, jurisdiction being given to that Court in any action brought against the Crown in the right of the Dominion by ss. 18 and 19 of The Exchequer Court Act, R.S.C. 1927, c. 34. Section 18 provides that "The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown." Section 19 reads in part: "The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters: . . . (d) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council." Under the heading of "Procedure", s. 37 of The Exchequer Court Act provides that any claim against the Crown may be prosecuted by petition of right.

The Petition of Right Act, R.S.C. 1927, c. 158, provides for the procedure to be followed in proceedings against the Crown by petitions of right, and clause (c) of s. 2 defines the term "Relief" as including "every species of relief claimed or prayed for in a petition of right, whether a restitution of any incorporeal right or a return of lands or chattels, or payment of money, or damages, or otherwise." Section 4 provides for the *fiat* of the Governor-General that right be done. Rule 6 of the Exchequer Court Rules provides, *inter alia*, that actions against the Crown are to be instituted by petition of right.

The definition of the relief granted by petition of right in the Dominion Petition of Right Act is identical with that set out in the Crown Procedure Act of British Columbia, referred to by Lord Buckmaster in the *Esquimalt and Nanaimo Railway* case. In *The Windsor and Annapolis Railway Company v. The Queen et al.* (1886), 11 App. Cas. 607, C.R. [9] A.C. 245, the Privy Council states in what cases petition of right is open to the subject. See also Clode, *Petition of Right*, 1887, and Robertson, *Civil Proceedings by and against the Crown*, 1908.

It is argued by Mr. Robinette that the words "suit or action against the Crown" in s. 18 of The Exchequer Court Act are

wide enough to embrace, and do embrace, actions of every nature and kind that may be brought against the Crown, and must therefore include an action such as that of *Dyson v. Attorney-General*.

A comparatively recent case in the Supreme Court of Canada, in which a claim for a declaration was sought respecting a patentee's rights, and in which The Exchequer Court Act and The Petition of Right Act of the Dominion, as well as the *Dyson* case, are discussed, is that of *The King v. Bradley*, [1941] S.C.R. 270, [1941] 2 D.L.R. 737, 1 Fox Pat. C. 131, 1 C.P.R. 1. It was held that if a patentee has a valid patent, and his invention has been used by the Crown within the meaning of The Patent Act, he has the right to be paid a reasonable compensation by the Crown, and a petition of right lies in the Exchequer Court of Canada to enforce such right. A claim for a declaration of the patentee's rights is a claim for relief, within the meaning of s. 2(c) of The Petition of Right Act, and s. 18 of The Exchequer Court Act. The relief granted would be a declaration of the said rights, and the judgment granting such relief is not a mere declaratory judgment, but is a judgment establishing the right to appropriate relief in the only form which can be done in a judgment against the Crown. Sir Lyman Duff, Chief Justice of Canada, discussed ss. 18 and 37 of The Exchequer Court Act, as well as s. 2(c) of The Petition of Right Act. He said at p. 274: "Section 18 [of The Exchequer Court Act] extends the jurisdiction of the Court to all those cases in which, the interests of the Crown being directly concerned, a bill could be filed, pursuant to a *fiat*, in the Court of Chancery as well as in the Exchequer, against the Attorney-General as representing the Crown, or in which he could be made a party." He further said, "I must not be understood as intimating an opinion that section 18 gives the Exchequer Court jurisdiction to entertain a proceeding such as that in *Dyson v. Attorney-General*, where an action was brought against the Attorney-General in the ordinary way without a *fiat* and the claim was only for a declaration that the plaintiff was under no obligation to comply with the provisions of a notice issued by the Commissioners of Inland Revenue; and no relief in respect of money, or property, or incorporeal right was claimed against the Crown. . . . In the nature of things the Court does not and cannot make a mandatory order against the Crown; but the

Court can and does declare the rights of the suppliant as between the suppliant and the Crown in cases of specific performance. . . . This, of course, is a vastly different thing from a judgment such as that in *Dyson v. Attorney-General*, which does not declare or decide that the subject is entitled to have something done in order to give effect to his legal rights as against the Crown, or that he is entitled to property or some interest therein, or to the possession thereof. The proceeding by petition of right is not applicable to such a claim as that in question in *Dyson v. Attorney-General*. Such a proceeding is only competent where a petition of right does not lie. (*Esquimalt & Nanaimo Railway Company v. Wilson*). It should not be overlooked that the Board in that case gave only a limited approval to the decision in *Dyson's* case; as to one incidental point."

I am of the opinion, therefore, that a suit or action against the Crown mentioned in s. 18 of The Exchequer Court Act, and a claim against the Crown arising under any law of Canada or regulation made by the Governor in Council, provided for by s. 19, are such actions or such claims as are the subject of a petition of right. If this be the case, and it having been held in the *Dyson* case, in the *Smith* case, and by the Privy Council in the *Esquimalt and Nanaimo Railway Company* case, that a petition of right is not the appropriate means of obtaining a merely declaratory judgment against the Crown, it must be concluded that the present suit is not one coming within the jurisdiction of the Exchequer Court of Canada. Furthermore, there is no procedure established by which a suit can be instituted in the Exchequer Court in which the Crown is a defendant, except by petition of right.

I think that the present case is one in which the Court, following the principle laid down in the decisions to which I have referred, might properly be called upon to exercise its discretion, assuming the evidence warranted the success of the plaintiff and subject to the further matter for consideration which was mentioned by Orde J. in his judgment after the trial of the *Smith* case, reported in 53 O.L.R. 572, [1923] 4 D.L.R. 1071, and that is, whether the Attorney General for Canada can be made a party defendant, in the courts of a Province, to an action for a declaratory judgment. Orde J. expressed grave doubt as to whether this could be done. In the case at bar a declara-

tion is claimed against the exercise of the executive power of the Dominion. If the right should lie in the plaintiff to have such a claim determined, but if it cannot be heard in a court constituted by the Dominion, then, unless a provincial court has the power or jurisdiction to entertain the plaintiff's suit, he could not obtain the relief to which he may have a discretionary right, assuming that the facts warrant such relief in the discretion of a Court, although an action for a declaration can be brought in England against the Attorney-General representing the Crown and could be brought in this Court against the Attorney-General of Ontario in his capacity as representing the Crown in the right of the Province of Ontario. In *Board v. Board*, [1919] A.C. 956, 48 D.L.R. 13, [1919] 2 W.W.R. 940, in the Privy Council, Viscount Haldane gave expression to the following axiom: "If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of Justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court."

In *Valin v. Langlois* (1879), 3 S.C.R. 1, the question of the jurisdiction of provincial courts was discussed. Ritchie C.J.C. said, at p. 19: "These Courts [Provincial Courts] are surely bound to execute all laws in force in the Dominion, whether they are enacted by the Parliament of the Dominion or by the Local Legislatures, respectively. They are not mere local courts for the administration of the local laws passed by the Local Legislatures of the Provinces in which they are organized. . . . They are the Queen's Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislatures, provided always, such laws are within the scope of their respective legislative powers." And again, at p. 20: "It cannot, I think, be supposed for a moment that the Imperial Parliament contemplated that until an Appellate Court, or such additional courts, were established, all or any of the laws of Canada enacted by the Parliament of Canada, in relation to matters exclusively confided to that Parliament, were to remain unadministered for want of any tribunals in the Dominion competent to take cognizance of them."

The National Resources Mobilization Act, 1940, and the Regulations made thereunder are laws of Canada.

Clement, in his *Law of the Canadian Constitution*, 3rd ed. 1916, p. 595, is of the opinion that: "Where complaint is made of unauthorized action threatened by any Crown official an action lies for a declaration of the subject's rights in the matter and in such an action the Attorney-General, federal or provincial as the case may be, is a proper defendant to represent the Crown. Whether such a declaratory *quia timet* judgment will be pronounced in any given case rests in the discretion of the Court."

I am of the opinion that the Supreme Court of Ontario has jurisdiction to entertain the action against the Attorney General for Canada.

The action is dismissed. The defendant is entitled to costs but possibly in the circumstances costs will not be demanded.

Action dismissed with costs.

Solicitor for the plaintiff: W. Glen How, Toronto.

Solicitor for the defendant: John J. Robinette, Toronto.

[COURT OF APPEAL.]

Dubensky and Chumack v. Labadie.

Agency—Agent purporting to Sign on Behalf of Principal—Proof of Authority—Principal Seeking to Enforce Contract—Mutuality.

Sale of Land—Vendor's Inability to Complete—Return of Deposit—Interest—Damages—Good Faith—One of Two Joint Tenants Accepting Offer to Purchase.

D signed an offer to purchase land from the defendant. In the body of the offer, as originally drawn, D's name was shown as offeror, but this was changed, on D's instructions, to the name of C, D's mother-in-law. D signed the offer, not describing himself therein as agent for C (although he informed the vendor's agent that he would act as C's agent in the matter), but in his own name simply. The offer was accepted by the defendant, who, however, was unable to complete because his wife, who was joint owner with him, would not agree to the sale. D and C sued for damages and for return of the deposit paid when the offer was signed. The trial judge found that D had signed the offer as agent for C, and accordingly gave judgment for C, but dismissed D's action. The defendant appealed, contending that there was no basis for awarding damages against him; he did not dispute his obligation to return the deposit, and to pay the purchasers' expenses of investigating the title.

Held (LAIDLAW J.A. dissenting), the award of damages could not stand. Although the trial judge had been quite correct in his conclusions as to the defendant's liability, C, the only plaintiff now before the Court, had not made out a case entitling her to damages. It was essential for her to prove that D had authority to enter into the contract as her agent, in such a way that she would be bound thereby, and the evidence had entirely failed to establish such authority. There was therefore a want of mutuality, which was fatal to C's right to recover.

Judgment of Greene J., [1944] O.R. 500, reversed in part.

AN APPEAL by the defendant from the judgment of Greene J., [1944] O.R. 500, [1944] 4 D.L.R. 253, in favour of the plaintiff Chumack. The facts are stated in the reasons for judgment.

19th April 1945. The appeal was heard by HENDERSON, LAIDLAW and MCRUER JJ.A.

G. A. Yates, for the defendant, appellant: There is no question as to the plaintiff's right to recover the deposit and the costs of search. We contest only the award of damages. The contract purports, on its face, to be between Helen Chumack and the defendant, but it was never signed by Mrs. Chumack. It was signed only by Dubensky, her son-in-law, who signed in his own name simply, and it was not proved in evidence that Dubensky was Mrs. Chumack's agent. He said in his evidence that they were to be joint owners of the land. [HENDERSON J.A.: That might have been the arrangement made by Dubensky and Mrs. Chumack between themselves, without affecting his position as her agent.] The contract was never in such a position that the defendant could have sued Mrs. Chumack for specific performance; there was no mutuality. [LAIDLAW J.A.: The contract reads "Helen Chumack offers to buy", and Dubensky signs it. Is that not enough to constitute him her agent?] Not in a court of equity. Before we can be liable in damages we must have been in a position to have obtained specific performance, and we never had any right of action against Mrs. Chumack. [MCRUER J.A.: Might you not have had a right of action against Mrs. Chumack for damages if Dubensky was in fact her agent?] Possibly, but that is not the same thing as having a right of action against her on the contract, and in any case there is nothing in the evidence to show that Dubensky was her agent. [LAIDLAW J.A.: He signed the document in which Mrs. Chumack was described as the purchaser. How can he contradict his own writing?]

This action was brought for specific performance of that part of the agreement which the defendant was able to carry out. There has never been a tender—we waived tender of the full amount of the purchase price, but there should have been a tender of one-half of the amount. [MCRUER J.A.: All the plaintiff got here was damages. Must there be a tender before an action for damages, where the vendor admits that he cannot carry out his contract?] Damages can be awarded only if the plaintiff would have been entitled to specific performance.

There is no evidence of damage. The only evidence on the point is that of Riberdy, who says the defendant told him he had an offer of \$10,000. No particulars of this offer are given; it is not stated to have been a cash offer, and it may not have been worth any more than the \$9,000 cash involved in this deal.

I. Levinter, K.C., for the plaintiff Chumack, respondent: Mrs. Chumack is described in the contract as the purchaser, and no evidence would be admissible to contradict the document. [MCRUER J.A.: Could Dubensky not have gone into the witness-box and said that he had had no authority to sign for her?] No. He was acting as agent for her, and whatever private arrangements existed between them, the position of the defendant was not affected by them. There is no denial of Dubensky's agency in the pleadings. The allegation there is that the purchaser's name was changed after the defendant had signed the contract, and the trial judge found against that allegation, which was overwhelmingly disproved by the evidence. [HENDERSON J.A.: It was part of the plaintiff's case to prove that there was a contract, and this would involve proving the agency.] The defendant signed with full knowledge of all the facts; he knew that he had a contract with Mrs. Chumack, and now Mrs. Chumack sues on that contract. Surely that is enough. Riberdy's evidence is that Dubensky told him he was acting as Mrs. Chumack's agent.

The only other defence pleaded is an allegation that the defendant's acceptance of the offer was expressly made conditional upon his wife's accepting. No evidence at all was given in support of this allegation, and the trial judge found against it.

We were not required to tender half of the purchase price, because the defendant had expressly refused to perform the contract or any part of it. The evidence as to damages was sufficient.

G. A. Yates, in reply: There is no allegation in the statement of claim that Dubensky was Mrs. Chumack's agent, or anything to suggest it.

Cur. adv. vult.

1st May 1945. HENDERSON J.A. agrees with MCRUER J.A.

LAIDLAW J.A. (dissenting):—The defendant appeals from a judgment of Greene J., dated the 29th day of September 1944, after trial without a jury at the city of Windsor. Under the

judgment the plaintiff recovered from the defendant damages in the sum of \$594.65 and a deposit of \$500. together with interest at the rate of 5 per cent. from the 18th day of May 1943. The claim of the plaintiff Teras Dubensky was dismissed without costs, and there is no appeal from that part of the judgment.

The appellant and his wife were joint owners of certain premises known as 3051 Riverside Drive in the city of Windsor. The firm of Riberdy Brothers, of which Frank D. Riberdy was a partner, was engaged by the appellant to procure a purchaser of the property. Mr. Riberdy showed the premises to Teras Dubensky and his wife. Dubensky was willing to purchase the property for the price of \$9,000. Riberdy made out an offer to purchase in writing, showing the name Teras Dubensky therein as purchaser.

There was evidence of a discussion between Dubensky and Riberdy tending to show that Dubensky and his mother-in-law Helen Chumack intended to have the title of the property placed in their joint names. Before Dubensky signed the offer to purchase, as prepared by Riberdy, he asked Riberdy to change his name, shown as purchaser in the document, to that of his mother-in-law Helen Chumack, and stated that he would act as her agent. Riberdy made the change as requested by Dubensky. Dubensky then signed his name to the offer, dated 18th May 1943. Subsequently the offer was accepted and signed by the appellant.

The appellant failed to obtain the consent of his wife to the sale of the property, and refused to carry out the transaction.

The respondent claimed in the action "Specific performance of the said contract to the extent that the defendant is able to perform the same with an abatement of a proportionate part of the purchase price; \$500.00 damages for breach of contract or in the alternative a return of the deposit of \$500.00; also \$1,000.00 damages for breach of contract."

The appellant is willing to pay the sum of \$500 deposited at the time the offer to purchase was signed, and also the sum of \$94.65, expenses said to have been incurred by the respondent, but contends that there is no liability on his part for the sum of \$500 awarded to the respondent by the learned trial judge for damages.

It is argued on behalf of the appellant that the respondent is not entitled in law to recover damages in the absence of proof

that Dubensky had authority to sign the offer to purchase on her behalf, so as to establish a binding contract mutually enforceable by the parties. It is urged that, under the circumstances, the appellant was unable to enforce the contract against the respondent, and that, in consequence, the action of the respondent for damages cannot be maintained. I cannot agree with this contention. In my opinion there was a valid contract made between the appellant and the respondent, and enforceable in law by the respondent. The offer was made by Dubensky, acting as agent for the respondent, through Riberdy, acting as agent for the appellant.

The learned trial judge makes these express findings:

1. "Dubensky signed as agent for Helen Chumack".

2. "Helen Chumack through her agent and co-plaintiff Dubensky executed an offer in writing . . . " and

3. "There was an offer to purchase by Helen Chumack and an acceptance by the defendant."

Statements made by Dubensky at the time the offer was signed are admissible to show the capacity in which he acted. Brett M.R. in *Young v. Schuler* (1883), 11 Q.B.D. 651, at p. 654, says:

" . . . the questions whether a person has signed his name at the foot of a document, and if so, for what purpose, are questions of evidence, and any evidence on the subject which does not contradict the document is admissible."

It is admitted by Riberdy, the appellant's agent, that Dubensky stated to him that he would act as agent for Helen Chumack. I quote the following evidence given by F. D. Riberdy in chief:

"Q. The offer to purchase that you referred to as having been made out by you, is that this offer of purchase? I am showing you Exhibit 2. Is that the offer to purchase which you said you make out? A. That is a copy of it, yes, sir.

"Q. That is a copy of it. And that was made out as an offer to purchase the property by Teras Dubensky? A. Yes, sir.

"Q. As originally made out? A. Yes.

"Q. Now, you say that a certain change was made; will you tell his Lordship what change was made? A. Mr. Dubensky at that time told me that his mother-in-law would be interested in the property, and to change the name from his own name to his mother-in-law's name, and that he would act as her agent, that he would make it part of his home.

"Q. Yes? A. So I advised him to see his lawyer, I would make the change, and then he could see his lawyer and make any other arrangements that he wished to do.

"Q. So then you changed it so that it became an offer for the purchase of the property by one Helen Chumack, his mother-in-law? A. Correct.

"Q. And you had Mr. Dubensky sign the offer? A. I did."

At the time the appellant signed the offer to purchase, the name "Helen Chumack" appeared and she was named therein as "purchaser". There was no possibility of misunderstanding on his part as to the person making the offer to purchase from him. Helen Chumack appeared as the principal contracting party.

Subsequently, and before the time for closing the transaction, the solicitor for the appellant was notified that Mr. Dubensky and his mother-in-law, Mrs. Chumack, would insist upon completion of the sale. He did not, at any time, refuse to carry out his obligations on the ground that the respondent was not a party to the contract. Indeed, the only grounds appearing in the statement of defence are:

"2. The defendant executed an offer of acceptance for a sale of the said lands and premises to the plaintiff Dubensky but afterwards the offer was materially altered and the name of the other plaintiff was substituted as purchaser without the knowledge or consent of the defendant and the said substituted offeror never has executed any offer to purchase the said lands and in consequence of such alteration the agreement became null and void.

"3. At the time of executing the acceptance of the offer the defendant stated he was only a half owner of the lands and the premises with his wife and that his acceptance was conditional upon her consent being obtained."

The appellant and respondent each appears as principal in the contract. It would not be permissible for either of them to adduce evidence to show that he or she was not bound as such. In my opinion the appellant would not be allowed to adduce evidence that the respondent did not make an offer to purchase or that she was not the purchaser. Such evidence would be in contradiction of the written agreement. In *Higgins et al. v. Senior* (1841), 8 M. & W. 834 at 844, 151 E.R. 1278, Parke B. says:

“ . . . to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement; which cannot be done.” See also *Katzman v. Ownahome Realty*, [1924] S.C.R. 18, [1924] 1 D.L.R. 201; *Musson v. Head*, 58 O.L.R. 210, [1926] 1 D.L.R. 965.

The commencement of the action by the respondent must be taken to be an admission by her of the contract, and she may maintain an action thereon notwithstanding she has not signed it.

“A person who has not signed an agreement may bring an action to enforce it against another who has signed it. The defendant cannot in such a case object the want of mutuality for want of execution of the agreement by the plaintiff, because the plaintiff would admit the contract by suing on it, and would be bound to perform it as a condition of obtaining specific performance of it.” *St. Vital Investments, Limited v. Halldorson and Clements*, 30 Man. R. 573 at 575, [1920] 3 W.W.R. 950, 56 D.L.R. 418.

A party may be chargeable with a contract on which the remedy on his part would fail for want of evidence to satisfy the Statute of Frauds. “A party by bringing an action upon a contract admits the alleged contract to be binding against himself”: Leake on Contracts, 8th ed. 1931, p. 194. See also *Baker v. Yorkshire Fire and Life Assurance Company*, [1892] 1 Q.B. 144 at p. 145, where Lord Coleridge C.J. says: “The plaintiff sues on the policy, and by so suing affirms it to be his contract.” See also Fry on Specific Performance, 6th ed. 1921, at pp. 225, 248 and 249.

In *Leask Cattle Company, Limited v. Drabble et al.*, [1922] 2 W.W.R. 674, 66 D.L.R. 791, affirmed 16 Sask. L.R. 373, [1923] 1 W.W.R. 126, [1923] 1 D.L.R. 546, it appears that an action for specific performance was based upon an assignment of a ranching lease. The document was in the form of a receipt from the defendants for the sum of \$500, and stated the terms of the transaction. It was signed by an agent of the plaintiff in his own name, and the concurrence thereto was signed by one of the defendants. The principal defence put forward by the defendants was that the document relied upon by the plaintiff company was not a contract and did not establish privity of contract between the plaintiff and the defendants. Defence

counsel also sought to question the authority to bind the plaintiff company of the person who signed the receipt. Both grounds of defence failed.

It is my conclusion, therefore, that the contention of counsel on behalf of the appellant cannot be given effect.

It remains only to mention the matter of damages allowed by the learned trial judge, and to supplement the authorities relied upon by him. It was held in *Pinsonneault v. Lesperance*, 58 O.L.R. 375, [1926] 1 D.L.R. 1153, that where a vendor in bad faith and for his own advantage breaks his agreement, the plaintiff's damages should not be confined to his expenses for searching the title, etc. He is entitled to compensation for the loss of his bargain.

There is evidence to support the finding of damages assessed by the learned trial judge, and the award made by him should not be interfered with.

For the reason given, I think the appeal should be dismissed with costs.

MCRUER J.A.:—This is an appeal by the defendant from the judgment of the Honourable Mr. Justice Greene, delivered following the trial of the action without a jury at the city of Windsor, awarding the plaintiff Helen Chumack the sum of \$594.65 damages for breach of contract, and the sum of \$500, together with interest at five per cent. from the 18th May 1943, being the amount of a deposit paid pursuant to a contract to purchase certain real estate in the city of Windsor.

In the statement of claim it is alleged that the plaintiff Teras Dubensky, on behalf of his mother-in-law, his co-plaintiff, executed an offer in writing to purchase the property known as 3051 Riverside Drive in the city of Windsor, and that the said offer was formally accepted by the defendant and constituted a binding contract for purchase and sale.

It is alleged in the pleadings that at the time of entering into the said contract the property in question was vested in the defendant and his wife Emily O. Labadie as joint tenants, and that the defendant made no effort to put himself in the position to fulfil his contract, and that he in bad faith repudiated the contract and refused to perform the same even to the extent of his interest in the lands. The plaintiffs claimed specific performance of the contract to the extent that the defendant might

be able to perform it, with an abatement of a proportionate part of the purchase price, \$500 damages for breach of contract, or in the alternative the return of the deposit of \$500 and \$1,000 damages for breach of contract, and in either event the costs of the action.

The defence put forward was that the defendant executed an acceptance of an offer to purchase the lands made by the plaintiff Dubensky, and that the offer was materially altered by substituting the name of Helen Chumack as purchaser without the knowledge or consent of the defendant, that the acceptance was conditioned upon the defendant obtaining the consent of his wife to the sale of the property, that his wife refused to convey the property, and that the plaintiffs had been so notified.

The learned trial judge found as a fact, and with his finding there can be no disagreement, that the change in the offer to purchase, substituting the name of Helen Chumack for Teras Dubensky as purchaser, was made before the offer was accepted by the defendant. He also found, and with that finding I agree, that the defendant was not relieved from liability to perform the contract by reason of his wife's refusal to convey the property in question.

There can be no doubt that the learned trial judge's reasons for judgment dealing with this aspect of the case are correct. Specific performance was refused, but judgment was given for the plaintiff Helen Chumack as hereinbefore indicated. The claim of Dubensky was dismissed with costs and the plaintiff Helen Chumack was awarded costs, subject to a set-off of any costs incurred by the defendant owing to the inclusion of Dubensky as a plaintiff in the action. Against this judgment the defendant appeals.

On the appeal it was argued that there was not sufficient evidence on which to found a judgment that a valid contract existed between the respondent Helen Chumack and the appellant, and in any case the evidence showed that at the most the plaintiff had only a half-interest in the contract and therefore the judgment awarding to her the full amount of the damages suffered for the loss of the bargain cannot stand.

The respondent founds her claim for relief on a contract in writing which originally showed T. Dubensky as purchaser, but on which Dubensky's name was struck out and the name "Helen Chumack" was substituted. The contract is signed by T. Du-

bensky only, with no reference to the capacity in which he signs. On the face of the written document the respondent has not signed any contract. Her right to recover damages is dependent on proof by competent evidence that Dubensky had authority to sign the document on her behalf so as to establish a binding contract of purchase and sale that would be enforceable by the appellant and respondent respectively.

Helen Chumack was not called as a witness, and we have no evidence from her to indicate what authority was vested in Dubensky to bind her by the terms of the written document. Dubensky was called, but we do not find in his evidence any explicit statement that he had authority to enter into the contract in question on behalf of Mrs. Chumack, or to render her liable to be bound by the terms thereof. He stated in evidence that the real estate agent representing the vendor handed him the typewritten agreement which he read over. Then come the following questions and answers:

"Q. And then what did you do after you read it? A. Well, I just told him that is—you change name from Mrs. Chumack, put—where is Dubensky put Mrs. Chumack, Helen Chumack, he says . . .

"Q. What? A. He's finish what paper was in my name Dubensky, I told him change name to Helen Chumack, he says why, he says my mother-in-law, he change it.

"Q. He changed it? A. Yes.

"Q. And then you signed it? A. Then I signed.

"Q. Now tell me this: who was buying this property, you or your mother-in-law? A. My mother-in-law and me.

"Q. Mother-in-law and you? A. Yes.

"Q. Both of you? A. Yes.

"Q. Who was going to spend the money? A. My mother-in-law half, I half.

"Q. You were going to spend each half? A. Yes.

"Q. When did you first decide that your mother-in-law was going to buy half of it? A. Like mother-in-law stay with me, and she is old woman, and she told me, you know, look for house, be look for house, and we show her to the home, and she is satisfied to buy the property with me.

"Q. Did she ever look at the property? A. No.

"Q. Now, tell me this: when you went into Mr. Riberdy's office you and your mother-in-law were both going to buy the property together? A. Yes.

"Q. Is that right? A. Yes.

"Q. Why did you not have the mother-in-law's name added in the offer instead of having her name put in in place of yours, if you were both going to buy? A. Because, you know, she want part for whole life, soon you know she keep property before she no pass, if she pass belong to me property, and I support her, you know—"

The witness was asked again:

"Q. Now, Mr. Dubensky, you have told me that when you went to Mr. Riberdy's office to sign the offer it was your intention that your mother-in-law and you buy the property together? A. Yes.

"Q. That is right? A. Yes.

"Q. Tell me, then, why, if that was the case, that your name does not appear in the offer? Why was your name taken out? A. Mine was name down.

"Q. Yes? A. I am sign.

"Q. Yes? A. Just you know we make extra agreement, we don't make a real deed, and as soon as I go to my lawyer I told lawyer, make agreement between me and my mother-in-law. She be, you know, my partner before she lived, after she is you know pass, belong to me property.

"Q. Whom did you intend the deed to be made to? A. Both.

"Q. To both? A. Yes.

"Q. You had your name struck out of the offer? A. Yes.

"Q. And her name put in? A. Yes.

"Q. Then why did you not have her sign the offer? A. Well, I sign one because I buy between me and her. As soon as I go to lawyer, make different you know deed."

Counsel for the respondent relies strongly on the evidence of Riberdy, the vendor's agent. Riberdy stated that Dubensky told him at the time the change was made in the offer that his mother-in-law would be interested in the property, and to change the name from his own name to his mother-in-law's name, that he would act as her agent, and that he would make it part of his home.

It is difficult to see the evidentiary value in this case of a statement made by Dubensky at the time the contract was entered into. In order to succeed, Helen Chumack must prove

Dubensky's authority to sign on her behalf. The mere fact that he stated he would act as her agent at the time the contract was entered into does not show that he had that authority. Even if this statement has evidentiary value it carries the case no further than Dubensky's evidence given in the witness-box. It is merely a statement that his mother-in-law would be interested in the property. Taking the most charitable view possible of the evidence, it cannot go further than to prove that Dubensky had authority to enter into a contract to purchase the property in question on behalf of himself and the plaintiff Helen Chumack and that they intended to acquire the property as joint tenants. The incoherent evidence would lead one to believe that this was the intention of Dubensky, but what his authority was to bind Helen Chumack is left substantially to conjecture.

Counsel for the appellant argues that before the respondent can recover damages she must produce in this trial evidence that would show a contract with the defendant of such a binding character that on the evidence shown he would have been entitled to enforce it against the respondent. With this contention I agree. If an action had been brought by the defendant against Helen Chumack to recover the purchase price, where is there evidence that would show that she had obligated herself to pay the purchase price of \$9,000 as set out in the agreement?

There is nothing in the evidence that supports the contention, on which the statement of claim and judgment are based, that this contract was signed by Dubensky for the exclusive benefit of the plaintiff. If such were the case it would have been very simple to have proved it by the evidence of the respondent, who was not called, or by a few plain questions put to the witness Dubensky.

The appellant makes no issue in this appeal of the claim for the return of the deposit, nor of the amount expended in investigating the title. The sole question is what damages, if any, the plaintiff is entitled to for the loss of her bargain. I do not think that the evidence proves the existence of a contract between the appellant and the respondent that would be mutually enforceable. The matter, however, may be approached from an alternative point of view with the same result. The learned trial judge has fixed the amount of damages for the loss of the bargain at \$500. Obviously the respondent, who is to have no more than a half-interest in the property, and who is

at the most to invest no more than half of the purchase price, could not in any case recover the full amount of the damages assessed for the loss of the bargain. There is no evidence before the Court as to whether the respondent would have been able to have sold a half-interest in the property at all. It is doubtful if she could have disposed of her interest otherwise than in a proceeding by way of partition and sale. The Court is left entirely without evidence in order to base an assessment of damages suffered by the respondent on the basis of the interest she is sworn to have had in the contract if a contract existed. Any claim that might have been put forward by Dubensky on an amendment to the pleadings, alleging that he acted as principal as well as agent of the respondent, cannot now be considered by this Court. The action brought by Dubensky on the pleadings as framed has been dismissed, and from this judgment there has been no appeal.

I cannot find that the respondent has made out an affirmative case for relief in damages by proof of the binding authority of Dubensky to enter into the contract on her behalf, nor can I find that there is affirmative proof of damage suffered by reason of the respondent's failure to secure a half-interest in the property, which interest might or might not have a market value. On this subject the Court cannot found a judgment on mere speculation.

I would, therefore, allow the appeal in respect of the amount awarded for damages for the loss of the bargain, and direct that the judgment below be varied by changing the amount of \$594.65, mentioned in the second paragraph thereof, to \$94.65.

The appellant should have the costs of the appeal and the respondent should have the costs of the action, both on the Supreme Court scale.

Appeal allowed in part, LAIDLAW J.A. dissenting.

Solicitors for the plaintiff, respondent: Spencer and Donaldson, Windsor.

Solicitor for the defendant, appellant: George Arthur Yates, Windsor.

[COURT OF APPEAL.]

The Town of Barrie v. Tuck.

Municipal Corporations—By-laws—Enforcement by Injunction—By-laws respecting Nature or Quality of User of Land or Premises—The Municipal Act, R.S.O. 1937, c. 266, ss. 430, 525.

A municipal by-law "to license, regulate and govern junk shops [etc.] . . . and for revoking such licenses", which clearly contemplates that no business of the kind specified shall be operated without a licence, and that the licence shall relate only to particular premises, is a by-law regulating both the nature and the quality of the user of land or buildings, and s. 525 of The Municipal Act applies to such a by-law, so as to enable the municipality to restrain contraventions by injunction.

AN APPEAL by the defendant from the judgment of Harvie Co. Ct. J., of the County Court of the County of Simcoe, granting an injunction. The facts are stated in the reasons for judgment of ROACH J.A.

6th April 1945. The appeal was heard by HENDERSON, LAIDLAW and ROACH JJ.A.

J. M. Bullen, K.C., for the defendant, appellant: Where a by-law is personal and deals only with the manner in which a business is to be carried on, it does not come within the scope of s. 525 of The Municipal Act, R.S.O. 1937, c. 266, and cannot be enforced by injunction at the suit of the municipality: *City of Toronto v. Mandelbaum*, [1932] O.R. 552 at 558, [1932] 3 D.L.R. 604.

The trial judge found only that the defendant had committed a breach of s. 1 of the by-law. He had operated for years, and had been convicted of receiving stolen goods, and the whole contention was that he was not a proper person to operate a junk shop. The Court cannot grant an injunction where (a) the by-law is personal, or (b) the by-law itself provides for a penalty for breach: *Attorney-General v. Sharp*, [1931] 1 Ch. 121. [LAIDLAW J.A.: The judgment expressly restrains him from using these particular premises. In substance the whole case dealt with the use of the premises.] The case was not so framed in the statement of claim.

J. R. Cartwright, K.C., for the plaintiff, respondent: The injunction sought and granted was against operating a junk shop at a named address. The case is within s. 525 of The Municipal Act, in that a building is being used in contravention of the by-law. Section 11 of the by-law clearly shows that it refers to user of premises or buildings, and the by-law is authorized by

s. 430 of the Act. The *Mandelbaum* case is distinguishable in that the by-law there in question was different, and had no section similar to s. 11 of the one here under consideration. Wright J.'s remarks in that case are *obiter*.

Even apart from s. 525, we are entitled to an injunction in equity, without any statutory provision: *Cooper v. Whittingham* (1880), 15 Ch. D. 501 at 506-7; *The Hamilton and Milton Road Co. v. Raspberry* (1887), 13 O.R. 466.

J. M. Bullen, K.C., in reply.

Cur. adv. vult.

1st May 1945. HENDERSON J.A.:—I have had the privilege of reading the opinion of my brother Roach, and I agree with his reasons and conclusion. I am not to be taken as approving of the opinion of Wright J. in the case of *City of Toronto v. Mandelbaum*, [1932] O.R. 552, [1932] 3 D.L.R. 604, with which I am not in agreement.

Since the opinion of my brother Roach was written, Mr. Cartwright of counsel for the respondent has filed an additional memorandum calling attention to s. 358 of The Municipal Act, R.S.O. 1937, c. 266.

LAIDLAW J.A.:—I agree with the opinion expressed by my brother Roach and with the reasons given by him. I desire to discuss very briefly the matters of consideration leading to my judgment.

The single question argued by counsel and requiring determination by the Court is this: Does a by-law of the Town of Barrie "to license, regulate and govern junk shops, junk yards, second-hand shops, automobile wrecking yards or premises, and dealers in second-hand goods, in the Town of Barrie, and for revoking such licenses" fall within the provisions of s. 525 of The Municipal Act, R.S.O. 1937, c. 266, so as to make available to the plaintiff the procedure therein provided by way of action to restrain contravention of such by-law?

Section 525 of The Municipal Act appears in its present form as s. 501 of The Municipal Act, 1913, 3-4 Geo. V, c. 43. In that form the section enlarges the scope and application of the section theretofore in force. Formerly, an action at the instance of a municipality to restrain contravention of a by-law could be brought only in respect of "The location, erection, construction

or use of any buildings": see 4 Edw. VII, c. 22, s. 19. The section, as presently in force, provides a remedy by way of injunction "Where a building is erected or used or land is used in contravention of a by-law". The question resolves itself into the simple inquiry as to whether or not the by-law in question is one to license, regulate and govern the user of land. It is contended that the by-law is one which makes provision for a personal licence only. I do not agree with that view. In form the by-law requires a person or corporation first to obtain a licence to operate within the limits of the town "junk shops, junk yards, second-hand shops, automobile wrecking yards or premises, and dealers in second-hand goods." It also provides for the fee to be paid for a licence "to carry on any of the businesses above referred to." But it is plain to me that the intent and purpose of the enactment is not to regulate or govern the class of persons who may obtain a licence, but to prevent the objectionable use of land or premises in the municipality. It will be noted that the shop or premises to be used must be approved by the medical officer of the Town of Barrie; also, the licence to be issued under the by-law contemplates a reference therein to the premises or buildings to be used. By s. 11 of the by-law, which provides for the cancellation of a licence, it is expressly stipulated that thereupon "the premises or buildings referred to in such license shall cease to be used for any of the purposes mentioned in this by-law." Again, it is plain to me that other provisions of the by-law relate to the user of land. The requirements that the proprietor or operator "shall at all times keep the goods, wares and merchandise to be sold or offered for sale, within a building", that "such goods, wares and merchandise . . . shall be displayed or kept in a neat, tidy, sanitary and safe manner" and that "no goods, wares or merchandise shall be located, displayed or piled nearer than ten feet from the boundaries of such premises", in form, relate to the conduct of business but, in substance, regulate and govern the use of the premises. I think that any distinction sought to be made by counsel between the form and the substance of the by-law is fallacious.

Counsel for the appellant relied upon *dicta* of Wright J. in the judgment delivered by that learned judge in *City of Toronto v. Mandelbaum*, [1932] O.R. 552 at 558, [1932] 3 D.L.R. 604. In my opinion, that *dictum* is not applicable to the present case. The learned judge had under consideration a by-law passed by

the Board of Commissioners of Police in the exercise of a power to pass by-laws "For licensing, regulating, governing and controlling the location of junk shops" In 1934, by 24 Geo. V. 1934, c. 34, s. 15(1), the legislation was amended to enable by-laws to be passed "For licensing, regulating and governing junk shops". Wright J. was of the opinion that the by-law before him "does not purport to regulate the location of any second hand shop . . . and apparently is not confined to any particular premises." He also held that "The plain intention of the by-law is to prevent objectionable persons from obtaining a license." I make the distinction at once from the present case that the plain intention of the by-law presently under consideration is to license, regulate and govern the user of land. It is also intended that the licence be confined to particular premises.

My conclusion, therefore, is that the by-law presently before the Court falls within the provision of s. 525 of The Municipal Act, and that the learned trial judge properly granted an injunction to restrain contravention of the provisions of the by-law.

ROACH J.A.:—This is an appeal from the judgment of His Honour Judge Harvie, County Judge of the County of Simcoe, granting an injunction restraining the defendant from operating or using the premises known as number 20 Bayfield Street in the town of Barrie, or any portion thereof, or the land appurtenant thereto, as a junk shop or second-hand shop.

By-law no. 1403 of the plaintiff corporation is entitled "A By-law to license, regulate and govern junk shops, junk yards, second-hand shops, automobile wrecking yards or premises, and dealers in second-hand goods, in the Town of Barrie, and for revoking such licenses." As amended by by-law no. 1422, it is as follows:

"WHEREAS it is deemed advisable to license, regulate and govern junk shops, junk yards, second hand shops, automobile wrecking yards or premises, and dealers in second-hand goods in the Town of Barrie.

"NOW THEREFORE, the Council of the Corporation of the Town of Barrie enacts as follows:

"1. No person or corporation shall operate within the limits of the Town of Barrie, a junk shop, junk yard, second-hand

shop or automobile wrecking yard or premises, or deal in second-hand goods without first having obtained a license from the Clerk of the corporation of the Town of Barrie.

"2. The proprietor or operator of any junk shop or second-hand shop shall at all times keep the goods, wares and merchandise to be sold or offered for sale, within a building, and none of such goods, wares or merchandise shall be offered for sale or sold except within such building.

"3. All such goods, wares and merchandise sold or offered for sale as mentioned in the next preceding paragraph, shall be displayed or kept in a neat, tidy, sanitary and safe manner.

"4. No person or corporation shall operate a junk shop, second hand shop, junk yard or automobile wrecking yards, or premises unless such shop or premises has been approved by the medical health officer of the Town of Barrie.

"5. Any person or corporation operating an automobile wrecking yard or premises shall keep the said yard and premises at all times in as neat and tidy a condition as possible, and no goods, wares or merchandise shall be located, displayed or piled nearer than ten feet from the boundaries of such premises.

"6. Any of the building or premises mentioned in any of the preceding paragraphs may be inspected at any time by anyone appointed by the Corporation of the Town of Barrie, for that purpose, and the proprietor of such building or premises will promptly make any reasonable changes in regard to the operation or conduct of the business carried on in such building or premises required by such inspector.

"7. No building or premises operated as an automobile wrecking yard shall be open for, or do or transact business between the hours of seven o'clock in the afternoon and six o'clock in the following forenoon, and shall not be open for, do, or transact any business between the hours of ten o'clock in the afternoon on Saturday and six o'clock in the forenoon of the following Monday.

"8. The operator or proprietor of any automobile wrecking yard or premises shall, at all times, conduct his business with as little noise as possible.

"9. None of the businesses mentioned in any of the foregoing paragraphs shall be conducted in such a manner as to be a public or private nuisance.

"10. The fee to be paid for a license to carry on any of the businesses above referred to, shall be \$5.00 and such license shall be in such form as may be prescribed by the corporation, and shall be issued by the clerk of the corporation, and shall be for the calendar year only in which the license is granted, and the said license fee shall be payable if and when such license is granted.

"11. Any license granted under the provisions of this By-law may be cancelled or revoked by the Council of the corporation at any time, without the said Council giving any notice or reason for such cancellation, and immediately upon the cancellation or revocation of such license, the premises or buildings referred to in such license shall cease to be used for any of the purposes mentioned in this By-law.

"12. That no keeper of a second-hand shop, junk store or automobile wrecking yard or premises shall directly or indirectly purchase from, exchange with, or receive from, or receive in pledge from any minor appearing to be under the age of eighteen years, without written authority from a parent or guardian of such minor, any metals, goods or articles.

"12 (A) The Keeper of every junk shop and second hand shop within the limits of the Corporation of the Town of Barrie, shall keep a book or register and it shall be the duty of the said keeper to enter or cause to be entered in the said book or register in pen and ink the names of persons from whom goods and merchandise are purchased, setting out the date, description of the article, and the amount paid for it, and similarly to enter or cause to be entered the name of persons who purchase goods from the said keeper as well as the date of the sale, the address of the purchaser and the amount paid for the article. Such entries in the book or register shall be made at the time of the sale or purchase.

"13. Any person or corporation contravening the provisions of any of this By-law shall, on summary conviction, be liable to a fine not exceeding twenty-five dollars (\$25.00) for a first offence and the costs of the Court, and in default of immediate payment the said fine and costs may be levied by distress on the goods and chattels of the offender, and in default of sufficient distress the offender may be imprisoned in the common gaol for the County of Simcoe for a period not exceeding ten days, and for a second or subsequent offence the offender shall be

liable, on summary conviction, to a fine not exceeding Fifty Dollars (\$50.00) and in default of immediate payment, the same may be levied by distress on the goods and chattels of the offender, and in default of sufficient distress, to a penalty not exceeding twenty-one days.

"14. That By-law No. 959 be and the same is hereby repealed.

"THIS BY-LAW SHALL COME INTO FORCE and have effect immediately after the final passing thereof.

"Read a first, second and third time and finally passed the seventh day of February, 1938.

(Seal)

"H. G. Robertson,

Mayor

"A. W. Smith,

Clerk."

In its statement of claim the plaintiff alleges that "The defendant and/or his servants, agents and employees are now operating and have been operating since the 1st day of January, 1944, and for a considerable time prior thereto the business of a junk shop, junk yard or second hand shop and have been dealing in second hand goods without having obtained a license as required" under the provisions of the said By-law 1403. It pleads the provisions of that by-law and of The Municipal Act, R.S.O. 1937, c. 266. The premises where it alleges the defendant operates the said business are not identified in the statement of claim, but in its prayer for relief it claims "an injunction restraining him, his servants, agents and employees from engaging either directly or indirectly in the business of operating a second hand shop or a junk shop at the premises in question or elsewhere in the Town of Barrie unless and until a license so to do is obtained from the plaintiff" as required by by-law no. 1403.

The defendant pleads, *inter alia*, that the plaintiff is not entitled to any relief by way of injunction.

The evidence discloses, and the trial judge has found as a fact, that the defendant has been and is operating a junk shop and second-hand shop at the said premises without a licence; that the defendant was granted a licence to operate a second-hand business, but it was finally cancelled in July 1939, since which time the defendant has operated in defiance of the by-law; that he has been convicted many times on charges of

operating the business in breach of the by-law, and notwithstanding those convictions he has blatantly continued to operate the business "not only in an obnoxious manner, but also in contravention of the terms and spirit of the said by-law, particularly with reference to the use in connection therewith of the premises in question."

It is not debatable that the defendant and his premises are entirely deserving the severe criticism contained in the learned trial judge's reasons, and with that criticism I entirely concur. However, the only point this Court has to decide is whether or not the plaintiff is entitled, on its pleading, to an injunction.

The by-law in question was passed under the authority of s. 430 of The Municipal Act, which provides that by-laws may be passed by the councils of towns, etc., "For licensing, regulating and governing junk shops, junk yards, second-hand shops and dealers in second-hand goods, and for revoking the license."

Section 525 of The Municipal Act enacts as follows:

"Where a building is erected or used or land is used in contravention of a by-law passed under the authority of this Act, in addition to any other remedy provided by this Act, and to any penalty imposed by the by-law, such contravention may be restrained by action at the instance of the corporation."

For the appellant it is argued that since the by-law provides the remedy in the event of its breach, the plaintiff is limited to that remedy, unless it can bring itself within s. 525; that s. 525 is not applicable, because the by-law is not one *qua* the use to which any lands or buildings may be put, and that the judgment should not have issued in its present form in view of the plaintiff's pleading.

For the respondent it is argued that s. 525 is applicable to the by-law in question, and also that, without the aid of the statute, the plaintiff is entitled in equity to an injunction.

A municipal corporation is a creature of the Legislature, and possesses only such statutory authority as the Legislature confers upon it. The statutory authority enabling it to enforce its by-law must, therefore, be found in The Municipal Act, and s. 525 of that Act is the only section which gives to a municipal corporation the right to enforce its by-laws by the restraint of an injunction. I think that section, in its applicability to by-laws passed under the authority of s. 430, makes the restraint by injunction applicable to the following possible contraventions

of such by-laws, *viz.*: (a) the user of land or buildings as a junk yard or junk shop or second-hand shop at a location or in a zone in which the by-law prohibits such land or shop being used; (b) the user of land or buildings as a junk yard or junk shop or second-hand shop in a manner not in conformity with the provisions of a by-law which prescribes or regulates the manner in which they may be used for such purposes.

In the first instance it is the nature of the user, and in the second instance the quality of the user, that is the determining factor.

Therefore, it is pertinent to inquire to what extent the by-law here in question relates to either the nature or the quality of user of lands or buildings. It certainly regulates the manner in which they may be used as a junk yard or a junk shop or a second-hand shop, that is, the quality of the user. See ss. 2, 3, 5, 7, 8 and 9. That certain of those regulations have been breached is abundantly clear from the evidence, but it is to be observed that the plaintiff does not plead those breaches, nor did the injunction issue in respect of them.

Then does this by-law regulate the nature of the user? It is basic that a junk yard or shop can be operated only at some particular location. I think that reading ss. 1 and 11 together it is apparent that what the by-law requires and contemplates is a licence to be issued to the operator in respect of premises to be therein described. The licence is, therefore, both personal to the licensee and limited to a particular premises. That it shall relate to a particular premises is evident from s. 4, which requires that the shop or premises shall first be approved by the medical health officer of the town. A reasonable construction of the by-law is that it prohibits the use of any land or buildings in the municipality for the relevant purposes except those in respect of which a licence is first issued. It is, therefore, a by-law relating to both the nature and the quality of the user and the contravention of it may be restrained by an injunction under s. 525.

Counsel for the appellant cited *City of Toronto v. Mandelbaum*, [1932] O.R. 552, [1932] 3 D.L.R. 604. In that case, Wright J., dealing with the by-law there in question, said: "... [it] does not purport to regulate the location of any second hand shop, but merely provides that it shall not be carried on without a license. Such a license is personal to the licensee and

apparently is not confined to any particular premises, so that it is not the use of land for any particular trade or business, that is aimed at by the by-law, but rather the conduct of a business." There the plaintiff sought an injunction, and the learned judge gave it as his opinion that the by-law did not fall within the class or description mentioned in s. 513, now s. 525, and therefore could not be enforced by means of an injunction. That case is to be distinguished from the case at bar in that here the by-law requires a licence, which, on my interpretation of the by-law, is to be limited to a particular premises.

Leave should be given to the respondent to amend its statement of claim by describing the premises where the defendant is operating the business in question as No. 20 Bayfield Street in the town of Barrie, and upon that being done the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, respondent: Boys & Boys, Barrie.

Solicitors for the defendant, appellant: McMaster, Montgomery, Bullen, Steele, Willoughby & McKinnon, Toronto.

[COURT OF APPEAL.]

Re Martello and Sons, Limited.

Companies—Winding-up—Where “just and equitable”—Management of Company—Conduct of Petitioner—The Companies Act, R.S.O. 1937, c. 251, s. 193(c).

The respondent was a private company, all the shares being held by members of one family. The petitioner was one of the shareholders, but had never taken any active part in the management of the company, which was under the entire control of the petitioner's brother, A.M. It appeared that A.M. had fraudulently misappropriated moneys belonging to the company, that the books had not been properly kept, that no full disclosure of the position of the company had been made to the shareholders, and that information had been withheld from an inspector appointed by the Court to investigate the affairs of the company.

Held, in these circumstances, it was “just and equitable” that the company should be wound up, and an order should be made under s. 193(c) of the Ontario Companies Act. There was no proof, that the petitioner, as was contended by the respondent, had been aware of the wrongdoing of A.M., or had in any way participated in it. The material showed a justifiable and well-founded lack of confidence in the conduct and management of the company's affairs, resting on the lack of probity in the conduct of its business. *Loch et al. v. John Blackwood, Limited*, [1924] A.C. 783, applied. An action would not afford adequate relief, since the petitioner was entitled to be protected against future, as well as past, misconduct.

Per MCRUER J.A.: An order made by a judge on an application for a winding-up order under s. 193 of the Ontario Companies Act is not a discretionary order, in the sense that it is an order with which an appellate Court will not interfere unless it is shown that the judge below has proceeded on a wrong principle. It is open to the appellate Court to consider all the materials before it, and if it is of the opinion that it is just and equitable that the company should be wound up, for some reason other than bankruptcy, it may set aside the judgment of the Court below, and make a winding-up order.

AN APPEAL by the petitioner from an order of Plaxton J., dismissing an application to wind up the respondent company. The facts are fully stated in the reasons for judgment.

13th and 24th April 1945. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and MCRUER J.J.A.

J. J. Robinette, K.C., for the petitioner, appellant: It is “just and equitable” that this company should be wound up, for a reason other than insolvency: The Companies Act, R.S.O. 1937, c. 251, s. 193(c). The petitioner, a substantial shareholder, has justifiably lost confidence in the management of the company's affairs, and such loss of confidence is rested upon a lack of probity in the conduct of those having a preponderance of voting power: *Loch et al. v. John Blackwood, Limited*, [1924] A.C. 783; *Re James Lumbers Co. Ltd.*, 58 O.L.R. 100, [1926] 1 D.L.R. 173.

In the case of a private company such as this, one director in the position of Alfred G. Martello is not entitled to treat the business of the company as his own and is not entitled to carry on the business as that of the company: *Baird et al. v. Lees et al.*, [1924] S.C. 83; *Thomson v. Drysdale*, [1925] S.C. 311. The material in no way establishes that the applicant was guilty of criminal conspiracy or of any conduct which would disentitle him to the relief which he is presently seeking.

Some cases in England indicate that in private companies, as distinguished from public companies, an order for winding-up may be more easily obtained. This is specially true in regard to family companies, which, although bearing a corporate appearance, are very much in the nature of a partnership. In such circumstances, the Court need only be satisfied that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it: *In re Yenidje Tobacco Company, Limited*, [1916] 2 Ch. 426 at 430. Where one partner has lost confidence in the carrying on of the business because of lack of probity, then the company should be wound up. The misconduct of the appellant's brother can be completely investigated only in a winding-up proceeding. Section 201(2) of The Companies Act confers wide powers upon the Court and liquidator to investigate matters of this sort. Having regard to all circumstances of the case, this is the only adequate method of inquiring into the conduct of Alfred G. Martello. His misconduct as a director of the company can only be successfully investigated in a winding-up by the Court: *In re Blériot Manufacturing Aircraft Company (Limited)* (1916), 32 T.L.R. 253.

The respondent contends that the appellant did not come into Court with clean hands. In effect, Alfred G. Martello has said in his affidavit that there was a conspiracy to defraud and that the appellant was a party to it. If that is so, there is a heavy onus upon Alfred to prove such an allegation and he, Alfred, is a self-confessed perjurer, who attempted to mislead Kelly J. in previous proceedings. As a matter of credibility alone, the Court is not likely to give much credence to this man. Alfred G. Martello offers no explanation to the Court for his flagrant perjury before Kelly J. [McRUER J.A.: What, if any, bearing upon your application has the fact that Alfred G. Mar-

tello did not comply with s. 109 of the Ontario Companies Act, in failing to reveal all facts to the Court's officer, the inspector appointed by the Court to investigate the affairs of the company?] It was his duty to be frank with the inspector and he did not co-operate. He deliberately withheld information and violated the provisions of The Companies Act. The creditors are not interested in this matter. The only parties interested are those before the Court. An interim liquidator should be appointed pending the appointment of a permanent liquidator.

J. R. Cartwright, K.C. (B. Weinberg with him), for the respondent: It is admitted that Alfred G. Martello did improperly deal with moneys that should have been shown as receipts of the company. A substantial sum of money has been paid to the government.

The petitioner is asking for an equitable and somewhat extraordinary remedy. The person asking for equitable relief must come into Court with clean hands in this particular matter. The word "equitable" is not used by chance. This rule should be strictly adhered to and the Court should not assist the appellant if his hands are unclean.

The power conferred by s. 193 of The Companies Act is a discretionary one and this Court will not interfere with the discretion of the trial judge unless he is wrong in principle: *Nolan v. Parsons et al.*, [1942] O.R. 358, [1942] 3 D.L.R. 190. The result of affirming the judgment in the case at bar would not be to leave the applicant without remedy.

The applicant did not come into court with clean hands as he participated in a division of funds knowing that they were being improperly kept out of the books of the company. He deliberately swore that he had received no moneys when he had really received substantial amounts. Upon the material before the Court it is apparent that the applicant is not proceeding in good faith but for the purpose of compelling the other shareholders to buy him out at an exorbitant price, because the company is busy and flourishing. If one reads the evidence as generously as possible towards the petitioner, one is still led irresistibly to the conclusion that he was aware of the whole scheme. It would be much better to uphold the judgment in appeal and leave the applicant to his rights in another action. I refer to 13 Halsbury, 2nd ed. 1934, p. 87, and the cases there cited. No one can have the assistance of the Court in an attempt

to place himself in a better legal position by breaking the law: *Re Bluebird Corporation Ltd.*, 58 O.L.R. 486 at 500, 7 C.B.R. 522, [1926] 2 D.L.R. 484. The trial judge exercised a wise discretion in not proceeding precipitately. If the order is granted a great deal of harm will result. We ask this Court not to interfere with the discretion of the lower Court. [LAIDLAW J.A.: Why should a company having carried on as this one has done be permitted to continue?] This company actually has a number of contracts in progress and to disrupt a going concern of this kind would be injurious to many people.

J. J. Robinette, K.C., in reply: As a result of these proceedings we are in the same position as if any other action had been brought. Alfred G. Martello has confessed to misappropriation and consequently we have lost confidence in his conduct of the business. On the material, it is not alleged or proved that the petitioner was implicated in his brother's misconduct.

Cur. adv. vult.

9th May 1945. ROBERTSON C.J.O.:—I have had the privilege of reading the reasons for judgment prepared by my brothers Laidlaw and McRuer. I agree that an order should go for the winding-up of the company, with a reference to the Master, and that the Chartered Trust and Executor Company Limited should be appointed interim liquidator. The costs should go as stated in the reasons for judgment of Laidlaw J.A.

The principal contention in this matter has arisen over alleged participation of the petitioner in the wrongdoing of his brother, Alfred Martello. It is contended that the petitioner did not come into court with clean hands, and this was the ground, as we are informed, for the dismissal of the petition by Plaxton J.

I am of the opinion, in the first place, that the participation alleged is not established. Even if the petitioner did receive from his brother money that he assumed came from the earnings of the company, that did not involve knowledge on his part of the misconduct of Alfred Martello in concealing a substantial part of the earnings of the company. Alfred Martello does not say that he informed the petitioner of the manner in which he was conducting the company's business, and unless so informed by some one else, the petitioner had no such contact with the affairs of the company at this period as would bring

home to him knowledge of the manner in which the company's affairs were being handled by Alfred Martello.

There is no suggestion that the petitioner received anything, either from the company or from Alfred Martello, more than he was entitled to have. He was not engaged in any scheme to defraud the company, or any of the creditors or shareholders. Any of the company's money that he received was no more than he was properly entitled to, if Alfred Martello had conducted the business of the company with the strictest regularity. I think there is nothing therefore to be urged against the petitioner on equitable grounds. The attempt on the part of Alfred Martello to attach some stigma to the petitioner only serves to throw a stronger light upon his own misconduct.

LAIDLAW J.A.:—The question the Court is called upon to answer in this appeal is this: Should Martello and Sons, Limited, be wound up on the ground that it is just and equitable to do so under the provision contained in s. 193(c) of The Companies Act, R.S.O. 1937, c. 251? I answer that question in the affirmative. The facts and findings upon which I base my judgment may be summarized as follows:

1. The company is a private one; all the issued shares of capital are held by members of one family; there are four shareholders of whom one holds one share only.

2. The management of the business and affairs of the company has been carried on by Alfred G. Martello.

3. The petitioner Albert Martello has had little or no part in such management and has received little or no reliable information concerning the affairs of the company.

4. Alfred G. Martello has been guilty of deceit, dishonesty and mishandling of the moneys belonging to the company.

5. The books of the company have been improperly kept; financial statements have not disclosed the true receipts, disbursements, profits or losses; annual returns have not been properly made.

6. The business of the company has not been carried on for the benefit of all shareholders, but on the contrary has been carried on in an improper, unfair and inequitable manner for the benefit and advantage of some of them to the detriment of the petitioner.

7. There was not a full, fair or proper disclosure by Alfred G. Martello to an inspector appointed by the Court to investigate the affairs of the company.

8. There is much suspicion attached to the issue of one share of stock to the wife of Alfred G. Martello and her subsequent election as a director of the company in place of the petitioner. The evidence points strongly to the view that it was intended to nullify the voting power of the petitioner and that he should be made powerless to exercise his rights as a shareholder.

It is my conclusion that there was a justifiable loss of confidence on the part of the petitioner in the management of the company. That loss of confidence arises from the improper conduct of Alfred G. Martello, who was in control of the management. It did not spring from any dissatisfaction at being ousted from the board of directors, nor from any dispute or differences on domestic policy.

I think it would be impossible for the petitioner to obtain relief through the medium of a meeting of shareholders. Also, in my opinion, the petitioner cannot obtain such relief in an action as urged by counsel for the respondent. An action in the courts would not provide means of protection against future misconduct on the part of the person or persons in control of the management of the company business. It would not restore the confidence of the petitioner in such persons, nor enable him satisfactorily to exercise his voting power in respect of company affairs. It appears to me likely that the company will never be able to carry on in an orderly, regulated and controlled manner, but on the contrary the affairs of the corporate body will be conducted in such a way as to cause injustice and inequity to the petitioner.

It is urged that the petition should not be granted by the Court because the petitioner seeks an equitable remedy and does not come to the Court with clean hands. I do not discuss the evidence in detail but I cannot find that there has been such conduct on his part as to deprive him of the relief he now seeks. I am somewhat impressed with his lack of frankness in answer to questions put to him on examination concerning moneys received by him from the company or its officers, but some criticism might fairly be directed to the form of the questions he was called upon to answer. The questions were not unequivocal,

and did not direct the attention of the witness to the very matter upon which the examiner sought information and answers.

I have read and considered the following cases in support of my judgment and reasons: *Loch et al. v. John Blackwood, Limited*, [1924] A.C. 783; *Re James Lumbers Co. Ltd.*, 58 O.L.R. 100, [1926] 1 D.L.R. 173; *Re Florentine Co. Ltd.* (1926), 31 O.W.N. 70; *Re Dominion Steel Corporation Ltd.*, [1927] 4 D.L.R. 110, affirmed 59 N.S.R. 398, [1927] 4 D.L.R. 337; *Re British Empire Steel Corporation Ltd.*, 59 N.S.R. 390, [1927] 2 D.L.R. 964.

It ought to be referred to the Master to appoint a liquidator and to take all necessary accounts and proceedings to wind up the company. I would appoint the Chartered Trust and Executor Company Limited to be interim liquidator.

The order of Plaxton J. should be set aside and this appeal allowed with costs in this court and in the court below. The costs of the reference ought to be in the discretion of the Master.

MCRUER J.A.:—This is an appeal by Albert F. Martello from the judgment of the Honourable Mr. Justice Plaxton dated the 13th day of March 1945, dismissing the appellant's petition for an order winding up Martello and Sons, Limited, a company incorporated under the provisions of the Ontario Companies Act. The company was incorporated on the 4th May 1939, to carry on business as general contractors, truck men, builders and dealers in real estate. Its principal business is said to have been excavating, contracting and leasing of excavating plant and equipment. It is a private company with capital stock consisting of 400 shares of a par value of \$100 each. Up until the 31st January 1945, 48 shares were outstanding, three of which had been issued for cash and 45 issued for the business sold to the company by the late John Martello. At relevant times 16 shares each were held by Mary Martello, widow of the late John Martello, Alfred G. Martello and Albert F. Martello, the petitioner. Prior to the 31st January 1945, the officers of the company were Mary Martello, president, Albert F. Martello, vice-president, and Alfred G. Martello, secretary.

The petitioner is a young man twenty-eight years of age, of little or no business experience. After leaving school, with

the exception of a short time employed as a grocery clerk, until his enlistment in His Majesty's forces in July 1942, he was employed with the respondent as a labourer, truck driver, and finally as a shovel operator. It is alleged in the petition, and uncontradicted, that since the death of John Martello the management of the business has been exclusively in the hands of Alfred Martello, and that the petitioner has not taken any part in the business management of the company other than to attend the shareholders' meeting held on the 9th January 1942, the directors' and shareholders' meetings held on the 31st January 1943, and on the 31st January 1945. No directors' or shareholders' meetings were held between January 1943 and January 1945.

In December 1943, after some disagreement over a matter not connected with the affairs of the company, Alfred Martello is said to have demanded that the petitioner endorse his certificates for 16 shares of stock in the company over to him. It is stated that when the petitioner refused to do so, he was physically attacked and the share certificates were taken from him. This is denied by Alfred Martello, but it is admitted that the share certificates were in his possession and remained in his possession until 23rd October 1944, when they were returned on the demand of the petitioner's solicitor.

The petitioner, having entered His Majesty's forces, is alleged to have had no communication with the officers of the company until 9th November 1944, when, in answer to a demand from his solicitor, he received through his solicitor what purported to be a balance sheet and statement of operating profit and loss account for the year ending 31st December 1943. The profit and loss statement showed a profit for the year 1943, before income tax, of \$1,856.37. At the directors' meeting held on 31st January 1945, a balance sheet and statement of profit and loss account were produced showing a profit for the year 1944 of \$212.33. The petitioner was of the opinion that in view of the fact that the company's equipment had been rented in the year 1943 and that the company had been extremely busy during the year 1944, the profits should have been much greater than were indicated in the financial statements. He therefore applied to the Honourable Mr. Justice Kelly, under the provisions of s. 109 of The Companies Act, R.S.O. 1937, c. 251, for the appointment of an inspector. In an affidavit prepared for use

on this application and sworn to by Alfred Martello on the 9th January 1945, it was stated that the financial statements for the year 1943, as prepared by the company's accountant, disclosed the whole earnings of the company for the year 1943. Mr. Justice Kelly made an order on the 11th January 1945, appointing John K. Punchard an inspector to investigate the affairs and management of Martello and Sons, Limited for the period from the 1st January 1942 to the date of the order.

An inspector, when appointed under the Act, is an officer of the Court. He has wide powers of investigation and reports to the Court. Any person refusing to produce books to the inspector or answer questions relating to the affairs of the company is liable to punishment on summary procedure.

Mr. Punchard made his report, which is dated 14th February 1945. The report shows that the regular books of the company are in balance and agree with the financial statements prepared by the company's auditor. The inspector states, however, that he was unable to satisfy himself as to the extent of the company's revenue or the propriety of all disbursements made out of the company funds. He suggested that all the rentals earned from the company's equipment were not shown in the books. He asked permission to examine the record of lessees of the equipment for the purpose of ascertaining how much was actually paid in rentals and to whom it was paid. Alfred Martello, in whose power it was to give such authority, refused to give the necessary permission. The inspector was advised, however, by the lessee of certain equipment that for a period of time cheques in payment for rental were made payable to the company and later to Alfred Martello at his request, and that the equipment was placed in the lessee's books in Alfred Martello's name.

The inspector was unable to verify the revenue for 1944. He pointed out many cogent reasons to support the view that the revenue was not all shown in the books of the company. Alfred Martello advised the inspector that he had no invoices or vouchers pertaining to disbursements made on the company's account for the two-year period, amounting to \$92,155.80. The inspector was, therefore, unable to verify the expenditures other than wages. He requested Alfred Martello to give him authority to examine the account of the company with the Reo Motor Company of Canada Limited and with General Supply Com-

pany Limited, so that purchases from these companies might be verified. This request was refused.

According to the by-law of the company, cheques were to be signed by two officers of the company, but the sum of \$38,350 was disbursed on the signature of Alfred Martello alone without any supporting vouchers by the transfer of large sums of money from the company account to bank accounts opened in the name of Alfred Martello personally. Alfred Martello stated to the inspector that the receipts or vouchers in connection with these payments had been destroyed and that there had been disbursements made in cash as a matter of expediency. Many other irregularities are set out in the inspector's report, which need not be referred to in detail.

The report concludes with this statement. "I have been denied adequate confirmation of the company's business transactions by reasons of,—(1) the lack of proper records and documents; (2) the refusal of the management to provide the means of obtaining independent verification. I have to report, therefore, that so long as satisfactory confirmation is denied, the adequacy of the revenue received by the company and the propriety of all disbursements is questionable. In my opinion the management have not properly accounted to the shareholders for the business with which they have been entrusted."

It may be noted here that on 31st January 1945, while the affairs of this company were under investigation by an officer of the Court, at a meeting of the directors held at the office of the solicitor of the company (who is not in any way connected with counsel appearing at the trial), a share of stock was issued to Augusta Martello, the wife of Alfred Martello. At a meeting of shareholders, held at the same place, on the same day, Augusta Martello was elected a director in the place and stead of the petitioner, notwithstanding his protest. On 20th February 1945, the petition to wind up the company was launched.

An affidavit of Alfred Martello was filed for use in opposing the petition. The following paragraph appears in this affidavit: "In so far as any moneys which were received and should have been treated as receipts of Martello and Sons Limited but were not so treated same were divided equally amongst the three shareholders of Martello and Sons Limited with the acquiescence and approval of the said Albert Frank Martello." This statement is a clear admission that the statement made by Alfred Martello

in his affidavit dated the 9th January, filed for use before the Honourable Mr. Justice Kelly, to the effect that the financial statement for the year 1943 showed all the receipts of the company, was clearly false and it must be taken to have been put forward for the purpose of deceiving the Court. The affidavit goes on to set out certain payments that were said to have been made by Alfred Martello to the petitioner, which it is alleged was a division of the money that had been misappropriated by Alfred Martello from the company's funds. Nothing, however, is said with respect to how these payments came to be made, or what led up to them. No effort is made to account for the moneys improperly withheld from the company, nor to indicate what the petitioner's share is said to have been.

The application for a winding-up order was dismissed by Plaxton J. No reasons for judgment were delivered, but it is said that he held that the petitioner was seeking equitable relief and that he did not come to the Court "with clean hands".

Counsel for the appellant asks leave to file an affidavit of R. S. Joy, the solicitor for the petitioner, to which are attached, as exhibits, a letter from B. Weinberg the company's solicitor, enclosing revised financial statements of the years 1943 and 1944, with copies of letters from the company's accountant to the company enclosing the same, dated 26th February 1945. I am of opinion that permission should be granted to file this affidavit, and that it should be received and considered by the Court. The material is most relevant to a proper disposition of the matter. It was material that was in the possession of the respondent before the hearing before Mr. Justice Plaxton and ought to have been made available to the Court at that time. It contains information that could have been made available to the inspector appointed by the Court, had Alfred Martello seen fit to do so. According to the revised financial statement for the year 1943, the net profit is shown to be \$14,272.03 as against \$1,856.37 as shown on the statement previously submitted to the shareholders. There is nothing to indicate what new records have been made available to the company's accountant in the preparation of the revised statement. The accountant merely states in his letter to the company, "In my opinion the aforementioned statements are properly drawn up and reflect correctly the position of the Company at December 31, 1943, and its operations for the year *according to the best of my*

information and as shown by the books of the Company.” (The italics are mine.)

No attempt was made to argue before this Court that the difference between the net profit as shown on the statement submitted to the shareholders and the revised statement of the 26th February 1945 was not due to the fraudulent misappropriation of the company's funds by Alfred Martello, nor was it suggested that there is anything before this Court to indicate that he has now properly accounted to the company for all money misappropriated. Counsel for the respondent did not condone or palliate what had been done, nor was it argued that the evidence before the Court was not sufficient to justify the Court in making an order that the company should be wound up under the provisions of s. 193(c) of The Companies Act.

The main ground on which the respondent relies is that the evidence shows that the petitioner knowingly participated in the money wrongfully withheld from the company, and that the Court ought not under those circumstances to exercise its discretion in his favour. It is argued that the same principles ought to be applied as on an application for equitable relief.

The petitioner denies that he had any knowledge that moneys were being improperly withheld from the company, or that he knowingly participated in any such moneys. It is unnecessary to go in detail into the allegations and counter-allegations that are contained in the material before the Court. It is sufficient to say that the evidence falls far short of showing that the petitioner was *particeps criminis* with Alfred Martello. There is evidence that Alfred Martello sent \$2,000 by two drafts to the petitioner on the 8th November 1943, which was some time after he had entered military service. The petitioner says that he understood that this was made up of money that he had loaned to his brother when he enlisted, and partly of money that he understood to be a dividend on his shares.

It is admitted that the petitioner had deposited approximately \$1,100 with Alfred Martello. It will also be noted that one of the drafts is for \$1,100. Alfred Martello states that this money was not loaned to him, but merely deposited with him. It is sufficient for the disposition of this case to find that Alfred Martello had this sum of money, which belonged to the petitioner, in his possession. Alfred Martello gives no particulars

of how the sum of \$2,000 was arrived at. He makes no suggestion of any discussion with the petitioner in regard to the fund in which he was alleged to be participating. He merely states that the money illicitly retained from the company was divided equally between the shareholders with the acquiescence and approval of the petitioner. How the acquiescence and approval was made manifest is not stated. It is stated that in addition to the sum of \$2,000 paid by drafts there were sums remitted by cash and money orders, making up the petitioner's one-third share. No details of these payments are given, and they are all denied by the petitioner. It having been shown that Alfred Martello has misappropriated sums of money belonging to the company in pursuance of a fraudulent scheme devised and carried out by him, it would require clear and cogent proof that the petitioner knowingly participated in the fraudulent scheme before it would be necessary to consider what effect such participation would have on his right to the relief asked. This proof not having been forthcoming, I would hold that there are no facts before this Court to justify refusing the petitioner's application on this ground.

It is contended that an order under s. 193 of The Companies Act is a discretionary order, and, the learned judge of first instance having exercised his discretion, his order ought not to be interfered with unless it can be shown that he proceeded on a wrong principle.

I am not of the opinion that an order made under s. 193(c) of The Companies Act is a discretionary order of such a character that it can only be set aside by an appellate Court if it is shown that the discretion was exercised on a wrong principle. In my view it is open to this Court to consider all the material before it, and if the Court is of the opinion that it is just and equitable that the company should be wound up for some reason other than bankruptcy, the judgment of the Court below may be set aside and a winding-up order made. Even if this Court were required to find a reason for interfering with the discretion of the learned trial judge, the fact that the respondent failed to produce to the Court the revised financial statement of 1943, that was available for production at that time, would be abundant reason for interfering with the discretion exercised on the material available in the court below.

It was argued that the petition should be refused because the petitioner was not himself frank with the Court. This argument is based on some apparent inconsistency between answers to questions put to the petitioner on cross-examination on an affidavit filed and statements made in a subsequent affidavit. A careful reading of the cross-examination indicates that counsel cross-examining was not directing the petitioner's mind to the subject-matter dealt with in the subsequent affidavit, and I cannot find that the contention that the petitioner has sought to deceive the Court has been made out.

Counsel for the respondent relies on an argument based on the hardship that would be wrought by a winding-up order and puts forward an undertaking given in the affidavit of Alfred Martello filed in the proceedings to the effect that the company was willing to give an auditor appointed by the petitioner fullest information as to all financial dealings of the company. These are matters that ought to have been considered at an earlier stage in these proceedings. In view of Alfred Martello's past conduct one could not have much confidence in any undertaking that he would give. His conduct toward the inspector appointed by the Court, together with the conduct of the other shareholders in ousting the petitioner from holding office in the company while its affairs were under investigation by the Court, does not cause one to look with sympathy on representations based either on the undertaking contained in the affidavit, or the hardship that might follow a winding-up order.

Finally, it was contended that the petitioner could obtain adequate relief in an action. A petitioner is entitled to be protected not only against the past misconduct of the management, but against future misconduct. Even though an action might give him some measure of relief for past misconduct, I do not think it would afford adequate relief therefor and certainly it would afford no protection for the future.

I am, therefore, of the opinion that the material shows that there is a justifiable and well-founded lack of confidence in the conduct and management of the company's affairs resting on the lack of probity in the conduct of the business of the company. It is therefore just and equitable that it should be wound up: *Loch et al. v. John Blackwood, Limited*, [1924] A.C. 783.

The appeal should therefore be allowed and the order of Mr. Justice Plaxton should be set aside and an order should go

directing that Martello and Sons, Limited should be wound up and that the Chartered Trust and Executor Company Limited be appointed provisional liquidator to take charge of the company's affairs until the Master has appointed a permanent liquidator. The usual order should issue with a reference to the Master to appoint a permanent liquidator and to take all necessary proceedings for and in connection with the winding up of the company.

Appeal allowed with costs throughout.

Solicitors for the petitioner, appellant: Taylor & Joy, Toronto.

Solicitor for the company, respondent: Bernard Weinberg, Toronto.

[COURT OF APPEAL.]

Young v. Younger et al.

Motor Vehicles—Negligence—Stopping Truck for Repairs in Line of Traffic.

Master and Servant—Negligence of Master—Knowledge by Servant, but No Voluntary Assumption of Risk—The Workmen's Compensation Act, R.S.O. 1937, c. 204, s. 121.

The plaintiff was driving the truck of G, his employer, along a wide street in Toronto where there was other traffic at the time. A passing driver called out that the rear light was dragging, and G (who was riding in the truck) insisted, despite the plaintiff's protests, upon stopping immediately. G determined to repair the light then and there, although the plaintiff protested that it was not safe to do so in the line of traffic. An automobile driven by Y, coming from behind, struck the truck, killing G and seriously injuring the plaintiff. The plaintiff sued both Y and G's estate.

Held, the plaintiff was entitled to recover as against both defendants. G had been warned of the danger of stopping there, but, disregarding the advice of an experienced driver, had insisted on stopping, and in staying in a position of danger after he knew or should have known of the risk. His negligence had been a *causa causans* of the injuries sustained by the plaintiff. As to Y, he had been either keeping an insufficient look-out or driving too fast for the look-out which could be kept. *Tart v. G. W. Chitty and Company, Limited*, [1933] 2 K.B. 453, applied. The plaintiff had not been guilty of contributory negligence, and, although he knew of the danger, he had not voluntarily assumed the risk, and the maxim *volenti non fit injuria* was inapplicable. *Canadian Pacific Railway Company v. Fréchette*, [1915] A.C. 871, referred to.

Judgment of Hope J., *ante*, p. 97, affirmed.

AN APPEAL by the defendants from the judgment of Hope J., *ante*, p. 97, [1945] 1 D.L.R. 601. The following statement of facts is taken from the reasons for judgment of LAIDLAW J.A.:

By a judgment of Hope J., dated the 4th day of January 1945, the plaintiff recovered the sum of \$4,500 for damages suffered by him by reason of the negligence of the appellant William Younger, Sr., and the late Kalman Grossman, the degree of negligence or misconduct on the part of the appellant William Younger being found 60 per cent. and that of the late Kalman Grossman 40 per cent. Both defendants now appeal to this Court.

The late Kalman Grossman was the owner of a light motor truck and occasionally employed the respondent in his spare time to drive it. On 10th September 1943, at about 8.15 p.m., the respondent was driving the truck easterly on Eastern Avenue in the city of Toronto, and was accompanied by Grossman, who was seated on the right side in the cab. Eastern Avenue is a wide highway, having three traffic lanes for east-bound traffic and three lanes for west-bound traffic. The respondent was travelling in the middle lane, about nine feet north of the south curb. There was other traffic moving in the same direction in the southerly lane, but the volume of it is in controversy. There is evidence that there was a driving south-west rain, and the visibility was low.

When the truck was in the vicinity of Woodfield Avenue, a street running northerly from Eastern Avenue, a driver in a vehicle passing the respondent on the left side (the most northerly of the east-bound traffic lanes) called to him that his rear tail-light and licence plate were dragging. The respondent informed Grossman, and after he tried, without success, to see the condition at the rear of the truck by looking backwards without leaving his seat, he opened the truck door, put his left foot on the running-board, stood up and looked to the rear. He then seated himself. As soon as Grossman knew that something was wrong he insisted on stopping the truck and he persisted in his demands on the respondent to do so. He opened the right-hand door and got partly out of the cab while the truck continued in motion. About that time a vehicle on the right, travelling in the same direction in the southerly lane, was passing and the driver of it (Loveys) heard Grossman ordering the respondent to stop and heard the respondent protesting and warning Grossman of the danger. The respondent again put his one foot on the running-board, stood up and looked forward with a view to finding a safe place to drive the truck to stop for

repairs. While he was doing so, Grossman moved over from his seat on the right until he was partly behind the steering-wheel, and was trying to stop the truck, although, on the evidence, it is doubtful if he could drive or knew how to apply the brakes properly. The respondent thereupon applied the brakes and stopped the vehicle. He got out, went to the rear, picked up the dragging parts and decided to throw them into the truck and move on at once. Grossman, however, decided otherwise. He also got out and went to the rear, pushed the respondent to one side, and was determined to tie the parts with twine to the rear of the truck. The respondent walked forward to the left door of the truck, intending to get in and away from danger of being struck by another vehicle. He then saw lights of a car about 60 feet to the west and travelling in the middle traffic lane directly towards the standing truck. He shouted to Grossman and stepped in a north-west direction with the intention of getting to a safe place. The oncoming car turned to the left, north-easterly, just in time to avoid a collision with the rear of the truck. The respondent changed his direction and moved rapidly towards the back of the truck and across the rear of it to the south-west corner. He had a fleeting glimpse of the car just clearing the north side of the truck, and almost at the same time caught sight of another motor car following at a very short distance. This car was driven by the appellant Younger. It struck the respondent and also Grossman and the truck, causing severe injuries to the respondent, and the death of Grossman.

3rd and 4th April 1945. The appeal was heard by HENDERSON, LAIDLAW and ROACH JJ.A.

Joseph Singer, K.C., for the defendant administrator, appellant: As against the estate, there is no sufficient corroboration of the plaintiff's evidence, as required by s. 11 of The Evidence Act, R.S.O. 1937, c. 119. The evidence of Loveys was not corroborative, nor was it of any probative value, since it was equally consistent with an order to the plaintiff to stop in a safe place. I refer, as to corroboration, to *Ollson v. Fraser, Barned and Powell*, [1945] O.R. 69, [1945] 1 D.L.R. 481.

The stopping of the truck was not the cause of the accident. The *causa causans* was the negligence of the defendant Younger: *Falsetto v. Brown et al.*, [1933] O.R. 645, [1933] 3 D.L.R. 545. [LAIDLAW J.A.: Was not the leaving of the truck standing a

continuing act of negligence? Do you say that it was only a *causa sine qua non*?] Grossman merely ordered that the truck be stopped; the plaintiff could have pulled in to the curb. [LAIDLAW J.A.: Although the trial judge has not particularized, he must have based Grossman's negligence on his stopping the truck. Could he not be held liable for nuisance, under the recent English cases?] There might be a liability to prosecution, but not a private liability to the plaintiff.

The "rescue" cases are wholly inapplicable. There is evidence that the plaintiff was not attempting to rescue Grossman when he was struck. [Counsel for the respondent here informed the Court that he did not seek to uphold the judgment on this basis.]

The plaintiff realized the danger of stopping where he did, and his claim is barred by the principle *volenti non fit injuria*. [LAIDLAW J.A.: The evidence shows knowledge on his part, but also continued protests against stopping there. The accident did not occur while he was helping Grossman, but while he was trying to get to a place of safety; he could hardly be called *volens* at that stage.]

There is no liability under The Workmen's Compensation Act, R.S.O. 1937, c. 204. The evidence does not show when the tail-light was broken.

D. B. Goodman, K.C., for the defendant administrator, appellant: As against the defendant Younger, the driver and the owner are in the same position. If the trial judge found negligence against Younger he could not also find it against Grossman, and Younger's negligence must be deemed the *causa causans* of the accident. In any event, the plaintiff was not bound to obey an order from the master, if he could reasonably anticipate danger: *Priestley v. Fowler* (1837), 3 M. & W. 1 at 6, 150 E.R. 1030; *Dokuchia v. Domansch*, [1945] O.R. 141, [1945] 1 D.L.R. 757. [HENDERSON J.A.: He considered it dangerous to stop, but because of repeated orders he did so. When he stopped, there was no traffic in sight.] If the plaintiff was not negligent, then Grossman was not negligent. The plaintiff was *volens*, not because he stopped, but because, knowing the danger, he got out of the truck: *McPhee v. The Esquimalt and Nanaimo Railway Company* (1913), 49 S.C.R. 43 at 50, 16 D.L.R. 756, 5 W.W.R. 926, 27 W.L.R. 444. His getting out was *novus actus interveniens*, and he had the last chance: *Davies v. Mann* (1842), 10 M. & W. 546, 152 E.R. 588; *Steven v. The Robert*

Simpson Co. Ltd., [1940] O.W.N. 415, [1940] 4 D.L.R. 504. As to the tail-light, the master had no more knowledge than the servant: *Murphy v. The City of Ottawa et al.* (1887), 13 O.R. 334; *The Canadian Northern Railway Company v. Anderson* (1911), 45 S.C.R. 355, 13 C.R.C. 339, 1 W.W.R. 501, 20 W.L.R. 416.

The "rescue" cases apply only where the defendant has been negligent as regards a third person, and is thus held liable to the rescuer on the ground of derivative negligence. They are inapplicable where there has been no negligence as towards a third person: *Dupuis v. New Regina Trading Company Limited*, [1943] 2 W.W.R. 593, [1943] 4 D.L.R. 275; *McDonald v. Burr*, 12 Sask. L.R. 482, [1919] 3 W.W.R. 825, 49 D.L.R. 396; *Anderson v. The Northern Railway of Canada* (1875), 25 U.C.C.P. 301; *Hay or Bourhill v. Young* (1942), 167 L.T. 261. The question of liability to a particular person only arises when the damage is foreseeable: *Fairweather v. Canadian General Electric Co.* (1913), 28 O.L.R. 300, 10 D.L.R. 130.

As to onus under s. 48(1) of The Highway Traffic Act, R.S.O. 1937, c. 288, see *Beaumont v. Ruddy*, [1932] O.R. 441, [1932] 3 D.L.R. 75. Grossman and the plaintiff are both to be considered as pedestrians, as against Younger.

C. M. Milton, for the defendant Younger, appellant: The parked truck here constituted a greater danger than there was in *Irvine v. Metropolitan Transport Co. Ltd.*, [1933] O.R. 823, [1933] 4 D.L.R. 682. I refer also to *Tidy v. Battman*, [1934] 1 K.B. 319; *Tart v. G. W. Chitty and Company, Limited*, [1933] 2 K.B. 453.

R. F. Wilson, K.C., for the plaintiff, respondent: Section 48(1) of The Highway Traffic Act applies as against Younger: *Fingland v. Brown and Garon*, [1943] O.R. 13 at 24, [1943] 1 D.L.R. 176. As to Grossman, our claim is based on two grounds, (a) negligence, and (b) the use of a defective vehicle. As to (a) the onus is on us, but as to (b), once the defect is established, the onus shifts, under s. 121 of The Workmen's Compensation Act.

Grossman was negligent within the principle of *Ware v. Garston Haulage Co. Ltd.*, [1943] 2 All E.R. 558. [LAIDLAW J.A.: If Grossman's negligence was in stopping the truck, was the plaintiff not equally guilty?] No, because he was not *volens*. If he was endangered by carrying out his master's orders, he has a right of action if he was hurt in consequence: *Bowater v.*

Rowley Regis Corporation, [1944] 1 K.B. 476. The mere fact that he obeyed the order did not make him *volens*. He was a servant until he tried to escape the danger. There was nothing to show that he acquiesced, and he could not be identified with the master while he was trying to escape. The questions of *volens* and contributory negligence are questions of fact, and there has been no finding against us on either: *Regal Oil & Refining Company, Limited et al. v. Campbell*, [1936] S.C.R. 309 at 313, [1936] 2 D.L.R. 609.

The question of concurrent or severable negligence, dealt with in *Mills et al. v. Armstrong et al. (The Bernina)* (1887-8), 12 P.D. 58, affirmed 13 App. Cas. 1 at 7, does not arise, because the plaintiff was still a servant, even though he protested against carrying out the order: *The Sault Ste. Marie Pulp and Paper Company v. Myers et al.* (1902), 33 S.C.R. 23 at 32; *Morton v. National Taxi Ltd. and Toronto Transportation Commission*, 66 O.L.R. 3 at 9, [1930] 4 D.L.R. 785; *Fulton v. Fegles-Bellows Engineering Co., Limited* (1919), 46 N.B.R. 249 at 255.

Grossman's negligence continued up to the time Younger struck the truck. There was a breach of duty in forcing the plaintiff to stop the truck in a position of danger with the object of making repairs, or, alternatively, when Grossman and the plaintiff were at the back of the truck, in insisting upon staying to make the repair.

The plaintiff was a "casual employee" within the meaning of s. 120 of The Workmen's Compensation Act: *Fairweather v. Canadian General Electric Co.*, *supra*; *Lewis v. Boutilier* (1919), 52 D.L.R. 383 at 389; *Mikenas v. Burley*, [1933] 3 W.W.R. 451; *Mazurkewich v. Bawkowy*, [1939] 3 W.W.R. 63, [1939] 4 D.L.R. 222. The defect in the truck could have been discovered: *Smith v. Charles Baker & Sons*, [1891] A.C. 325 at 362; *Hurley v. Boyce*, 61 O.L.R. 618, [1928] 1 D.L.R. 1053; *Lewis v. Nisbet & Auld Limited*, [1934] S.C.R. 333, [1934] 3 D.L.R. 241. In this last case Duff C.J.C. distinguishes between the English and the Ontario law in this respect. Our law is not based, as is the English, on the master's negligence: see *Regal Oil & Refining Company Limited v. Campbell*, *supra*; *Davidson v. Handley Page, Ltd.*, [1945] 1 All E.R. 235.

Joseph Singer, K.C., in reply: Younger had the last chance of avoiding the accident, and his negligence should be held to be the sole cause: *Engel v. Toronto Transportataion Commission*,

59 O.L.R. 514 at 518, [1926] 4 D.L.R. 986; *Maitland v. Raisbeck* (1944), 60 T.L.R. 521.

An obstruction of a highway is a nuisance only if it is continued for an unreasonable time; here the obstruction was not unreasonable in the circumstances: *Brenner et al. v. Toronto R.W. Co.* (1907), 13 O.L.R. 423 at 439, 6 C.R.C. 261.

Cur. adv. vult.

16th May 1945. HENDERSON J.A.:—An appeal from the judgment of the Honourable Mr. Justice Hope, dated the 4th day of January 1945. This case was very fully and ably argued by counsel for all parties, and a number of authorities on each aspect of the case were cited. Written reasons for judgment were delivered by the learned trial judge and are said to have been delivered on the 8th January 1945. I do not know how it came about that the formal judgment was dated four days earlier than the reasons.

Except in regard to one matter, with which I shall deal presently, I am in agreement with the reasons for judgment and conclusions of the learned trial judge.

One aspect of the case which was argued was as to whether the line of authorities known as the “rescue” cases apply to this case. The learned trial judge seems to have applied them and to have relied upon them in part, in founding his judgment against the defendant Guaranty Trust Company.

The evidence of the plaintiff is to the effect that at the time he received his injuries, he was not attempting to rescue his employer, the deceased Grossman. The evidence indicates that when the plaintiff left the driver's seat and got out on the running-board on the second occasion on which he did so, the deceased Grossman, who had been sitting to his right, slid into the driver's seat which Young had vacated, so that Young was unable to get back into the truck. It then appears that Young proceeded to the rear of the truck with a view to gathering up the tail-light assembly and throwing it into the rear of the truck. The deceased Grossman followed him to the rear of the truck, took the tail-light assembly out of his hands, evidently with a view of trying to repair it, and asked for some string. The plaintiff, sensible of the danger of their positions, called out a warning to his employer and from that time his movements seem to have been confined to efforts to place himself in a position of safety, which he did not succeed in doing.

In my opinion there is ample evidence to support the findings of the learned trial judge of negligence, on the part of both the deceased Grossman and the defendant William Younger, Sr., and in my opinion there is no evidence to support a finding that the plaintiff was *volens* as well as *sciens*.

For these reasons I would dismiss the appeal with costs.

LAIDLAW J.A. [after stating the facts as above]:—The learned judge found “that the deceased Grossman was guilty of negligence which, combined with the negligence of the defendant Younger, brought about the injuries to the plaintiff.”

Counsel on behalf of the administrator of the estate argues that there was no negligence on the part of Kalman Grossman; that if there was any such negligence it was not a proximate cause of the loss or damage sustained by the respondent; that the cause thereof was negligence of the appellant Younger, or in the alternative negligence of the respondent, or in the further alternative the combined negligence of Younger and the respondent. It was also argued on behalf of the appellant, the administrator of the estate of Kalman Grossman, that there was no corroboration of the respondent's evidence sufficient to satisfy the requirements of The Evidence Act, R.S.O. 1937, c. 119, s. 11.

Counsel for the appellant Younger likewise argues that there was no negligence on the part of Younger; that, if so, it was not a proximate cause of the respondent's loss or damage; and also in the same manner as counsel for the administrator of the estate that the cause thereof was the negligence of the respondent and/or Grossman.

Both counsel urge that there was contributory negligence on the part of the respondent; that the doctrine of *volenti non fit injuria* is applicable to the facts and constitutes a good defence to the respondent's claim; and that the learned trial judge erred in finding that the respondent endeavoured to “rescue” Grossman from peril and improperly applied principles of law applicable in such cases to the case at bar.

It may be observed at once that the judgment in appeal is not in the same position as a judgment after trial with a jury. It is not the function or duty of this Court to consider whether there is any evidence to support the findings of the learned trial judge. We must consider whether we would have reached the same conclusions on the evidence which was accepted by the trial judge: *Wilson v. Kinnear et al.*, [1925] 2 D.L.R. 641 at 646.

There can be no doubt that the accident was caused by negligence. The question is, whose negligence was it? Was it the negligence of (a) Grossman, or (b) Younger, or (c) the respondent, or (d) more than one of them? In my opinion the evidence shows plainly that there was negligence on the part of Grossman. He was warned of the danger of stopping the truck in the traffic lane. He disregarded the advice of an experienced driver. He insisted on stopping. He took control of the situation when he saw the conditions at the rear of the truck. He then insisted on staying in a position of danger after he knew or ought to have known the risk of doing so. He negligently and recklessly exposed himself to the danger of being struck by a vehicle driven in the same traffic lane. He created an obstruction and a hazard to such traffic.

During the argument, and afterwards, I was not free from doubt as to the result in law of Grossman's negligence. I was inclined to think that his acts were a *causa sine qua non* but not a *causa causans* of the accident. It was urged by counsel that negligence of the appellant Younger was the real and sole cause of the injuries suffered by the respondent; that Younger had "the last chance" and could have avoided the accident, notwithstanding negligence on the part of Grossman. But a careful study of the evidence satisfies me that the negligence of Grossman was a contributory cause of the accident, and was not severable from that of Younger. That appellant (Younger) was, without doubt, in my mind, at fault.

The authority relied upon by the learned trial judge, *viz.*, *Tart v. G. W. Chitty and Company, Limited*, [1933] 2 K.B. 453 is clearly applicable. Younger was not keeping a sufficient look-out or was travelling too fast for the look-out that could be kept. Younger's negligence and Grossman's negligence operated concurrently, and each contributed, by his negligence, to cause the accident.

I cannot accept the argument that there was negligence on the part of the respondent. I can find no evidence of any want of care on his part under the circumstances.

It is my view that the finding of the learned trial judge that the respondent was attempting to rescue Grossman from the danger in which he was placed by the approaching car, cannot be supported on the evidence. The respondent definitely and emphatically contradicts such a suggestion and testifies that

he was endeavouring in his movements to escape from danger and risk of accident to himself. This fact is stated in many places in the evidence. But it is not necessary to apply the principles of law applicable to such a case of "rescue", because, in my opinion, the negligence of both appellants contributed to cause the respondent's injuries, and liability on their part follows in consequence. I add that the degrees of fault on the part of the respondent and appellants as found by the learned trial judge are, in my opinion, correct and cannot be interfered with.

The argument that the doctrine of *volenti non fit injuria* is applicable to the facts of the case, cannot succeed. The respondent knew the danger of stopping the truck in the traffic lane under existing conditions and the danger of remaining there. But there is no evidence that he voluntarily assumed the risk of doing so. He was not *volens*, and in the absence of such a finding, the doctrine cannot be given effect: see *Canadian Pacific Railway Company v. Fréchette*, [1915] A.C. 871 at 880, 22 D.L.R. 356, 18 C.R.C. 251, 31 W.L.R. 872, 24 Que. K.B. 459.

The argument that there was no corroboration of the respondent's evidence as against the appellant administrator of the estate of Kalman Grossman cannot succeed. There was sufficient evidence to satisfy the requirements of The Evidence Act. That evidence was properly given by the witness Loveys and the necessary corroboration is found therein.

My judgment is that the appeals of both appellants ought to be dismissed with costs. As between the appellants, each one should be liable to make contribution and indemnify the other in respect of the costs of this appeal in the degree in which they were respectively found to be negligent.

ROACH J.A. agrees with LAIDLAW J.A.

Appeal dismissed with costs.

Solicitor for the plaintiff, respondent: R. Rodness, Toronto.

Solicitor for the defendant Younger, appellant: A. J. Doane, Toronto.

Solicitors for the defendant administrator, appellant: Singer & Kert, Toronto.

[ROSE C.J.H.C.]

Re Allinson and the Court of Referees.

Administrative Tribunals—Judicial Functions—Discretion as to Procedure—Special Statutory or other Provisions.

War Measures—Selective Service—Dismissal of Employee—Powers of Court of Referees—Procedure on Appeal—Giving Opportunity to Appellant to be Heard—Meeting Respondent's Case—The Unemployment Insurance Act, 1940 (Dom.), c. 44, ss. 52, 53—National Selective Service Civilian Regulations, s. 214.

A court of referees, set up under s. 214 of National Selective Service Civilian Regulations and ss. 52 and 53 of The Unemployment Insurance Act, is, at least when hearing an appeal from a ruling of a selective service officer, a judicial rather than an administrative body. It does not follow, however, that it is bound to follow any procedure established in courts of justice. Its basic duty is to act "judicially", as that term is used in *Local Government Board v. Arlidge*, [1915] A.C. 120, and, provided it does this, it is entitled, subject to any rules laid down for it in the statute or the regulations, to follow whatever course of procedure seems to be best adapted to enable it to perform its own particular duty. *Re Ashby et al.*, [1934] O.R. 421, referred to.

The provision of s. 214(8) of the regulations, that the procedure on a hearing shall be determined by the chairman, is subject to the express limitation of s. 214(9), that the court shall not decide an appeal until the claimant has been given a reasonable opportunity to make any representations he desires the court to consider in making its decision. If the chairman adopts a general rule of hearing the parties separately, and the claimant is thereby deprived of the opportunity of knowing the arguments and representations made in reply to his case, he is not given a reasonable opportunity within the meaning of s. 214(9), and an order dismissing the appeal, made in such circumstances, must be quashed.

A MOTION to quash an order of a court of referees. The reasons for judgment of Rose C.J.H.C., granting a writ of *certiorari* to bring up the order, are reported in [1944] O.R. 492, [1944] 4 D.L.R. 301.

12th and 19th February 1945. The motion was heard by ROSE C.J.H.C. in Weekly Court at Toronto.

C. L. C. Allinson, applicant, in person.

J. E. Day, K.C., for the Minister of Justice, the Department of Labour and the National Selective Service.

5th April 1945. ROSE C.J.H.C.:—Pursuant to the order of *certiorari* to bring up the record of proceedings and the decision of a court of referees for the purpose of reviewing the action of that court in connection with an appeal taken to it against a ruling granting permission to Civil Service Commission of Canada, Department of Labour, to terminate Mr. Allinson's employment ([1944] O.R. 492), returns have been made, and Mr. Allinson now moves to quash the order of the court of referees by which the appeal was dismissed.

The grounds of the motion as stated in the notice of motion and in the affidavit in support are (1) that the court of referees had no jurisdiction to hear and determine the appeal, (2) that if the court of referees originally had jurisdiction it "denuded itself of jurisdiction by the manner in which it conducted" the hearing, and (3) "that there was before the court of referees no evidence upon which it could fairly, honestly, impartially and judicially reach its said decision to dismiss" the appeal.

In so far as the first ground of the motion, *viz.*, that the court of referees had no jurisdiction, depends upon the allegation that the court was without jurisdiction because the applicant was an officer in His Majesty's Civil Service of Canada and that the National Selective Service Civilian Regulations ([1943] 1 C.W. O.R. 196) were inapplicable to him as a civil servant, I think the attack fails because the applicant has not established the fact that he was appointed under The Civil Service Act, R.S.C. 1927, c. 22, rather than under the provisions of what is spoken of as P.C. 1/1569, *viz.*, a minute of a meeting of the Treasury Board, approved by His Excellency the Administrator-in-Council on April 19, 1940, by which provision is made for temporary employment subject to termination without notice. The evidence as to the manner in which Mr. Allinson was employed is meagre, consisting almost entirely of a letter produced by him notifying him of his appointment (his exhibit B(1)), and a copy from the files of the Civil Service Commission of what professes to be a record of the temporary employment of the applicant (respondents' exhibit No. 2). The inference from these documents and from what little is said about them in the affidavits is that the applicant's status at the material times was that of a temporary employee to whom the regulations set out in P.C. 1/1569 applied; but whether or not that inference is correct, the fact is that the applicant's general allegation that he had the status upon which his main attack upon the jurisdiction of the court of referees depends is not established. Therefore it is not necessary to consider whether it is open to the applicant, having appealed to the court of referees; even in the conditional manner in which he did appeal, to question the jurisdiction of that court to hear his appeal.

The second ground of the motion, *viz.*, that the court of referees denuded itself of jurisdiction by the manner in which

it conducted the hearing of the appeal, I pass over for the moment.

The third ground, *viz.*, that there was no evidence before the court of referees upon which it could fairly, honestly, impartially and judicially reach the decision to dismiss the appeal, fails, in my opinion, upon the facts. It is not for this Court to say what the decision of the court of referees ought to have been upon the evidence, documentary and parol, that was before it, but it is, I think, manifest from a perusal of the exhibits and of the affidavits that there was evidence to support a finding that the ruling of Mr. Boyer, against which the appeal was taken, was a justifiable ruling.

To return to the second ground of the motion to quash: the allegation, referred to in my reasons for granting the order of *certiorari*, *viz.*, that the court of referees had rendered its decision before Mr. Allinson was heard, is entirely displaced by the evidence. It was based upon the fact that the certificate of the decision seemed to indicate that the decision was come to at a time before the hearing actually took place. But the fact, as the affidavits show, is quite different. However, there was a refusal to allow Mr. Allinson to hear the case made against him, and to give him an opportunity of answering it, and the effect of that refusal is, as I see it, the real question for determination upon this motion.

What happened at the hearing before the court of referees was this: Mr. Allinson was called before the court, and although he complained that he had not been afforded access to various documents which he said were essential to him in the presentation of his case, he was directed to proceed with his argument, and he did so at very considerable length, laying before the court a large number of papers of one sort and another and commenting upon them and stating many facts, his endeavour being, in part, to show that his services as an enforcement officer had been, or ought to have been deemed to be, satisfactory and that Mr. Boyer ought not to have authorized the giving of the "notice of separation from employment". When this presentation of his case had been concluded, he was instructed to retire, which he did under protest, saying that if there was to be other evidence he must be allowed to cross-examine upon it. Mr. Dillon was then called before the court, and, as appears by his

affidavit, was instructed to give his evidence and to present his case on behalf of the Department of Labour. He supplied to the members of the court copies of the case on behalf of the Department prepared by him and made various submissions, taking the position that there was no allegation on the part of the Department that Mr. Allinson had been guilty of serious misconduct and contending that Allinson was not a permanent civil servant but a temporary employee on probation selected and appointed for temporary employment and subject to dismissal without notice, and he presented to the court what he refers to as "the original of his appointment" (the paper above referred to as the respondents' exhibit No. 2) and he explained to the court that, while Allinson "was subject to immediate dismissal at any time without the necessity of giving any reason therefor, under the provisions of the Civil Servants Act he had been given notice, and the requirements of the National Selective Service Regulations had been met as well." The "case" that Mr. Dillon presented was a typewritten document of some ten pages containing a detailed criticism of and answers to the various points made by the applicant in his notice of appeal to the court of referees. It included this statement: "8. This employer does not admit, for the reasons hereinbefore stated, that it is required to submit facts to support its reasons for dismissing this employee by legal notice, but it does feel that for the satisfaction of this Court some circumstances of the employment and dismissal of this employee should be set forth and the following facts are so submitted, without prejudice to the employer's rights in any way:—". Then it went on to state the facts as to the appointment of Mr. Allinson and as to the nature of his duties and of alleged reasons why his services were by the employer deemed to be unsatisfactory; and many documents (letters, copies of letters, etc.) were made exhibits.

When Mr. Dillon had presented his case the court of referees proceeded to pronounce judgment dismissing the appeal. No reasons for the judgment were given and there is no means of saying whether the court was giving effect to points of law raised by Mr. Dillon or was basing its decision upon some question of fact.

Mr. Day, basing his argument largely upon some of the remarks made by Masten J.A. in delivering the judgment of the

Court of Appeal in *Re Ashby et al.*, [1934] O.R. 421, 62 C.C.C. 132, [1934] 3 D.L.R. 565, takes the position that the decision of the court of referees was the decision of an administrative tribunal acting within its proper province and possessing a complete, absolute and unfettered discretion, having no fixed standard to follow and therefore being guided and properly guided by its own ideas of policy and expediency, and, therefore, that the Supreme Court ought not, acting upon its own ideas of proper procedure, to interfere. Naturally he attaches a good deal of importance to the fact that s. 214(8) of the regulations provides that "The procedure on a hearing shall be determined by the chairman of the court of referees" and to the fact stated by Mr. Dillon in his affidavit that the chairman of the court of referees at Kitchener had adopted as a general rule the practice of hearing the parties separately, and that in accordance with such usual procedure, he, Mr. Dillon, was not permitted to hear the case presented by the applicant.

The court of referees consists of one or more members chosen to represent employers, with an equal number of members chosen to represent employees, and a chairman appointed by the Government: see s. 214(2) of the regulations and ss. 52 and 53 of The Unemployment Insurance Act, c. 44 of the Dominion statutes of 1940. It does not seem to be quite in the position of the Local Government Board whose procedure was under consideration in *Local Government Board v. Arlidge*, [1915] A.C. 120, that is to say, as far as the regulations show, it is not so much an organization with executive functions resembling those of great departments of state as a body set up merely to hear appeals—at any rate in the case under consideration the particular court of referees was hearing an appeal, and, like the Board of Examiners in Optometry for Ontario in the *Ashby* case, was exercising a judicial and not an administrative function. But it does not follow that because the court of referees was exercising a judicial function it was bound to follow the procedure with which we are familiar in courts of justice. The basic duty of a body of the sort, as appears from the *Arlidge* case, is to act judicially, *i.e.*, to preserve a judicial temper and perform its duties conscientiously with a proper feeling of responsibility; of course, it is bound to observe any rules laid down for its guidance in the statute (or, in this case, the regula-

tions) by which it is constituted; but otherwise it is free to follow whatever course of procedure seems to be best adapted to enable it to perform its own peculiar duty; which fact is made very apparent in the present case by s. 214(8) of the regulations.

Probably when an employer whose establishment has been classified as a "designated establishment" applies to a selective service officer under s. 202A(4) (a) for permission to give notice of separation to an employee, the selective service officer, in deciding whether the employer ought to be freed from the prohibition contained in the subsection, will be guided to some extent by considerations of departmental policy, and it may be that a court of referees, in dealing with an appeal from the ruling of the selective service officer, will also be guided to some extent by similar considerations, and this fact makes it additionally desirable that the court of referees should have a very large discretion as to the procedure to be followed. When an appeal is lodged the appellant may, by notice in writing, apply for a hearing (s. 214(6)), but the chairman of the court of referees may refuse the application, or, whether or not an application has been made, may direct that there shall be a hearing, and if a hearing is ordered the chairman, as has been stated, may determine the procedure on the hearing. But that power to determine the procedure is limited by the express requirement (s. 214(9)) that the court of referees shall not decide an appeal until a reasonable opportunity has been given to the claimant to make any representations which he desires the court to consider in making its decision. In the present case the hearing was ordered and both sides were to a certain extent heard; I do not know that the court of referees failed to act "judicially", in the sense in which that expression is used in *Arledge's* case; but I do not think that a reasonable opportunity was given to the claimant to make all the representations that he desired the court of referees to consider in making its decision, because I think that, having regard to the nature of the case presented by Mr. Dillon in which he set up points of law and made numerous assertions of fact, it was impossible that Mr. Allinson, knowing nothing about what was being put forward, and being quite ignorant, for instance, of the fact that his claim to the status of a civil servant, in the ordinary sense of the term, was

disputed, had any reasonable opportunity of making the representations that he would have made if he had been informed of the points, whether of law or of fact, made against him. Therefore, I am driven—rather reluctantly I confess—to think that the time for deciding the appeal had not arrived, and that the decision that the appeal be dismissed must be quashed. My reluctance is due, in part at least, to the fact that I cannot make out what benefit Mr. Allinson thinks he can derive from the quashing of the decision of the court of referees. He does not suggest that any mandatory order directing the court of referees to proceed to afford him an opportunity to make further representations ought to be, or indeed could be, made. All that he asks is that the decision be quashed, and the quashing of the decision will not have the effect in any way of reversing the ruling of the selective service officer from whom the appeal to the court of referees was taken, and, of course, it will not reinstate Mr. Allinson in his employment. So, I repeat, that while I think that, as a matter of strict right, he is entitled to have the decision of the court of referees quashed, I am quite reluctant to quash it, as I think I am bound to do.

The order dismissing the appeal from the ruling that has been under consideration will be quashed. I do not think that there ought to be any order as to costs.

Order quashed.

Solicitors for the respondents: Day, Ferguson, Wilson & Kelly, Toronto.

[PLAXTON J.]

Bell v. Williamson and Moulton.

Fraudulent Conveyances—Proof of Intention—Distinction according to whether Conveyance Voluntary or Made for Valuable Consideration—Acceptance of Obligation to Provide for Grantor—Status to Maintain Action to Set Aside Conveyance—The Fraudulent Conveyances Act, R.S.O. 1937, c. 149, s. 2—Statute 13 Eliz. c. 5.

The Fraudulent Conveyances Act, and the statute 13 Eliz. c. 5 from which it is derived, are not intended solely for the benefit of judgment creditors. The reference is to "creditors or others", and an action may accordingly be maintained to set aside a conveyance as fraudulent by anyone who has a claim against the grantor, even if that claim has not been reduced to judgment. There appears to be no difference, in this respect, between claims *ex delicto* and claims *ex contractu*. *Hopkinson v. Westerman* (1919), 45 O.L.R. 208, applied. Where, however, the plaintiff is not a judgment creditor, he must sue on behalf of himself and all other creditors of the grantor, and the style of cause must so indicate. *In re Tottenham; Tottenham v. Tottenham*, [1896] 1 Ch. 628; *Brown v. Weil* (1927), 61 O.L.R. 55, and other authorities, applied. In such circumstances also, the plaintiff's relief, if he is successful, is limited to setting aside the impeached conveyance. *Mitchell v. Jeffrey et al.*, [1944] O.W.N. 540, and other authorities, followed.

Where a conveyance is voluntary, the burden of proving an intent to defeat creditors is lighter than where it is made for valuable consideration. In the case of a voluntary conveyance, the necessary intent will be inferred or presumed, if the circumstances are such that the conveyance will necessarily have that result. *French v. French* (1855), 2 Jur. N.S. 169; *The Sun Life Assurance Company of Canada v. Elliott* (1900), 31 S.C.R. 91; *Doty v. Marks* (1924), 55 O.L.R. 147, and other authorities, applied. If, however, that is not its necessary effect, the intent must be established, and the Court must decide in each case, on all the circumstances, whether it can conclude that the settlor's intention in making the settlement was to defeat, hinder or delay his creditors. *Godfrey v. Poole et al.* (1888), 13 App. Cas. 497, applied. In deciding this question, the Court must consider the circumstances existing at the time of the conveyance, and not subsequent events, except such as must have been in contemplation at the time. *Donohoe v. Hull Bros. & Co. et al.* (1895), 24 S.C.R. 683, referred to. In this connection, it is important to consider the plaintiff's claim, and his prospects of success therein, as these appeared at the time of the conveyance. *Ex parte Mercer; In re Wise* (1886), 17 Q.B.D. 290; *Hopkinson v. Westerman*, *supra*, applied.

Where a grantee accepts, by the deed, an obligation to provide for the grantor for the rest of his life, to permit him to live on the property granted, and to pay his funeral expenses, the conveyance is not voluntary; this covenant constitutes valuable consideration. *Campbell v. McDonell* (1927), 33 O.W.N. 246, applied; *Anderson v. Bradley* (1921), 51 O.L.R. 94, distinguished. In attacking such a conveyance as fraudulent, the plaintiff must therefore affirmatively prove an intention to defraud creditors, and this proof must be based upon something far beyond mere suspicion. *Shephard v. Shephard* (1925), 56 O.L.R. 555, applied.

AN ACTION to set aside a conveyance as fraudulent. The facts are fully stated in the reasons for judgment.

19th and 20th December 1944. The action was tried by PLAXTON J. without a jury at Woodstock.

R. A. MacDougall, for the plaintiff.

J. H. Clark, K.C., for the defendants.

17th May 1945. PLAXTON J.:—This is an action by the plaintiff, suing as sole executrix under the last will and testament of the late James Hugh MacKenzie, deceased, to have set aside and declared fraudulent and void as against the plaintiff and the other creditors of the late Andrew Dunn, deceased, and to have declared void on the ground of his legal incapacity to deal with his property, a certain deed dated 23rd July 1942, from Andrew Dunn to the defendants, of lands described as the south half of Lot 13, in the First Concession of the Township of North Oxford, in the County of Oxford (Ex. 4), and a certain bill of sale dated 23rd July 1942, of certain household effects, farm implements, live stock and other chattels mentioned therein, from Andrew Dunn to the defendants (Ex. 3).

The plaintiff is the sole beneficiary, as well as the executrix, of the estate of James Hugh MacKenzie, who died on 8th October 1942. He was then seventy years of age (Ex. 2). The defendants are the two daughters of Andrew Dunn, who died on 21st January 1944. He was then in the eighty-fourth year of his age.

In the light of the medical and other testimony adduced at the trial, counsel for the plaintiff abandoned the plaintiff's claim in so far as it was founded upon the alleged incapacity of Andrew Dunn to make the conveyance and bill of sale hereinbefore mentioned.

The present action was preceded by an earlier action which is now in abeyance, but still pending. In this earlier action, commenced by a writ issued on 28th January 1943, the plaintiff, as executrix of the last will of the late James Hugh MacKenzie, asserted a claim against the late Andrew Dunn for the value of certain implements and stock and for certain arrears of wages she claimed were owing to MacKenzie by Dunn.

It is not necessary to review the various developments in that action in detail. Suffice it to say that before the action came down to trial Andrew Dunn died. His death occurred, as already stated, on 21st January 1944. He died intestate. The solicitor for the plaintiff then became aware, for the first time, of the conveyance and bill of sale mentioned above, and was informed that the two defendants in the present action,

the only heirs and next-of-kin of the late Andrew Dunn, had no intention of applying for letters of administration of his estate, as there were no assets in his name at the time of his death.

Pursuant to a certain direction made by Barlow J. on 14th February 1944, counsel for the plaintiff made application before the Master at Toronto, on 23rd May 1944, for the appointment of an administratrix *ad litem* and for leave to amend the statement of claim by adding a claim to have set aside the conveyance and bill of sale as being fraudulent and void as against the creditors of Andrew Dunn. The Master, in a judgment dated 31st May 1944, held that the Supreme Court had no jurisdiction under Rule 90 to appoint an administratrix *ad litem*: see *Martin v. Martin et al.*, [1937] O.R. 759 at 767, [1937] 3 D.L.R. 418, per Rose C.J.H.C.; and counsel for the defendant having objected to the proposed amendment of the statement of claim on the ground that it introduced a new type of action, the application was dismissed.

The late Andrew Dunn, in his lifetime, owned and operated a farm near the town of Ingersoll in the county of Oxford. The farm is that described in the deed of conveyance (Ex. 4). Dunn bought this farm in 1895 for the sum of \$6,000. It is unencumbered (Ex. 5). There resided with him on the farm, down to 17th July 1942, the plaintiff Bell, who had been employed as housekeeper for a period of some ten years, and also the late James Hugh MacKenzie, who had lived there for some forty-seven years. Dunn's only next-of-kin are his two daughters, the defendants, who now reside in the city of Windsor, Ontario. John Martin, Deputy Registrar of the Surrogate Court of the County of Oxford, testified that no application had been made for letters of administration of the late Mr. Dunn's estate.

Mrs. Williamson testified that she had lived within one and one-half miles of her late father's farm until 1940. Since then she had lived in Windsor, but, according to her testimony, she and her sister were in the habit of visiting the farm once a month, she herself remaining there two or three days, and her sister, Mrs. Moulton, for a week, on the occasion of each visit.

In March 1942 Andrew Dunn suffered a stroke. The defendants then arranged for the plaintiff Bell to carry on the financial

affairs of the farm out of the proceeds of the sale of milk to the cheese factory. Out of these proceeds the plaintiff met the ordinary expenses of the farm, including her own wages, wages of the hired man Cant, grocery bills and the like (plaintiff's examination for discovery, qq. 1-11). This arrangement worked satisfactorily until the early part of July 1942. The plaintiff Bell had been unable to obtain the July cheque from the cheese factory (plaintiff's examination for discovery, qq. 76-77); and about the same time MacKenzie got in the habit, for some undisclosed reason, of abusing both her and Andrew Dunn, the latter to such an extent as to cause him to cry, and finally to insist that the plaintiff call up his two daughters on the telephone, and ask them to come at once to the farm (plaintiff's examination for discovery, qq. 21-28 and 34). Dunn had decided that some new arrangement would have to be worked out for the carrying on of the affairs of the farm (plaintiff's examination for discovery, qq. 71-72). The defendants arrived at the farm on 15th July 1942. The plaintiff Bell then told them she was going to leave their father's service, and the defendant Mrs. Moulton told her to go (plaintiff's examination for discovery, qq. 74-75). This was on 16th July 1942. The same day the two defendants went over to Herbert Dunn's farm in the close neighbourhood. He is a nephew of the deceased Andrew Dunn, and they wished to consult him as to what arrangements should be made to carry on the management of the farm. Their father had indicated that he wished his own relations to carry on the business of the farm. It was suggested that Mrs. Moulton should take over the running of the farm, but she was unable to do so. The next day, which was 17th July, the plaintiff Bell, according to Mrs. Williamson's testimony, persuaded MacKenzie to leave the farm with her. MacKenzie was, she stated, in a terrific temper and would not speak to her father. MacKenzie, before leaving, claimed that he had bought certain of the farm implements and had also paid the funeral expenses of the late Mrs. Andrew Dunn on her death some eight years earlier. The defendant Mrs. Moulton, her sister Mrs. Williamson testified, told MacKenzie to take the implements, but he wanted money. He made no mention, at that time, of any claim for wages. Indeed, the plaintiff, in her examination for discovery, testified that she had never heard of any claim to wages on the part of MacKenzie during the years she was on the farm, or of any

claim on his part for moneys paid for implements or for funeral expenses until the day they left the farm, 17th July 1942 (plaintiff's examination for discovery, qq. 12, 13, 65, 66, 68 and 69). Ex. 9 is a slip of paper on which Mrs. Moulton jotted down at the time the items of MacKenzie's claim. There are three items, two in respect of implements and one in respect of funeral expenses, amounting in all to \$750. Mrs. Williamson swore that her father had denied that he owed MacKenzie a single dollar. Ex. 10 is a receipt dated October 1934, for payment of funeral expenses in the sum of \$250. The receipt does not indicate on its face who paid the account, but it was produced from the custody of the defendants.

According to the evidence of Mrs. Phyllis Poole, secretary in the law office of Messrs. MacDougall & Whaley, of Woodstock, MacKenzie consulted Mr. MacDougall on 18th July 1942. Ex. 1 is a letter dated 20th July 1942, which Mr. MacDougall addressed to the defendant Mrs. Moulton, in care of Andrew Dunn, asserting a claim on behalf of MacKenzie against Andrew Dunn, to a life interest in the farm after Dunn's death, and for certain sums of money which he alleged he had paid for stock and implements on the farm.

On 21st July 1942, the two defendants, who in the meantime had visited Windsor, called upon Mr. MacDougall. He told them he had already been consulted by, and was acting for, MacKenzie, and suggested that they see another solicitor. At Herbert Dunn's suggestion, and accompanied by him, the two daughters then went the same day to consult William A. Calder, another Woodstock solicitor. They had with them Mr. MacDougall's letter of 20th July 1942 (Ex. 1). They indicated to Mr. Calder that, although their father did not owe MacKenzie any money, they wished, without prejudice and purely on compassionate grounds, to pay MacKenzie \$750, the amount he claimed to be due him. Mr. Calder testified that he advised them the claim was fantastic and to do nothing about it; but, at their insistence, Mr. Calder wrote Mr. MacDougall a letter dated 21st July 1942 (Ex. 6), offering to pay MacKenzie the sum of \$750 in cash, conditional upon his executing under seal a document in the nature of a general release of all demands. On the same occasion, at Herbert Dunn's suggestion, they discussed with Mr. Calder arrangements for carrying on the management of the farm. Herbert Dunn testified that Mr. Calder

was strongly in favour of Andrew Dunn making a will; but he, Herbert Dunn, was opposed to this idea, because the two defendants could not live on the farm all the time. Moreover, Andrew Dunn would be living with strangers and might be induced by them to make a new will. He suggested, as an alternative, an arrangement similar to one his father had made with him. Mr. Calder approved of the proposal and, the two defendants agreeing, he was instructed to prepare the appropriate documents. The title papers and other necessary particulars were brought to him on 22nd July. The documents prepared by him are Exhibits 3 and 4, *viz.*, the bill of sale and the deed of conveyance hereinbefore mentioned. Mr. Calder testified that he put the transaction in the form indicated by these documents because the two defendants were the only next-of-kin of Andrew Dunn, and, as he understood, Mr. and Mrs. Moulton were going to live on the farm in performance of the obligation of the two defendants under the terms of the deed of conveyance to keep Andrew Dunn for the rest of his life. There was, Mr. Calder testified, no suggestion or idea of defeating any claim on the part of MacKenzie.

On 23rd July the two defendants, accompanied by Andrew Dunn and Herbert Dunn, called at Mr. Calder's office. Calder explained the documents which he had prepared to Andrew Dunn and elicited his approval of the whole transaction. Andrew Dunn thereupon signed the bill of sale (Ex. 3), and the deed of conveyance (Ex. 4). Ex. 3 was duly filed in the County Court Clerk's office, and Ex. 4 was duly registered in the County Registry Office, on 24th July 1942. On the same day, according to the testimony of A. W. Green, manager of the Ingersoll branch of the Royal Bank of Canada, Andrew Dunn's bank account at that branch, having a credit balance of \$183.25, was closed out and a new account was opened in the name of the two defendants. Andrew Dunn, Mr. Green testified, had always met his obligations.

Ex. 7 is a letter dated 24th July 1942, from Mr. MacDougall to Mr. Calder. The 24th July was a Friday. Mr. Calder, in his evidence, thought he might not have seen this letter until the following Monday. In this letter Mr. MacDougall stated that MacKenzie had agreed to accept \$750 in settlement of his claim for certain implements which he claimed to have bought for Mr. Dunn, but that he did not agree to settle his other claim

for the promise to give him a life interest in the farm and stock, or wages in lieu thereof. MacDougall also stated that MacKenzie had instructed him that he was not prepared to settle his other claims for less than \$5,000 and did not seem to be disposed to reduce his claim by way of settlement.

Ex. 14 consists of two letters, one dated 18th November 1942, from Mr. MacDougall to Mr. Calder, offering to accept \$750 in satisfaction of the late Mr. MacKenzie's claim, and the other a letter dated 17th December 1942, from Mr. Calder to Mr. MacDougall refusing to pay the claim.

The defendant Mrs. Williamson testified that her father had no creditors. As against this, evidence was adduced by the plaintiff of a claim asserted by one B. F. Scott, feed merchant of Ingersoll, against Andrew Dunn, for \$104, less \$38.85, on a note made in 1933, but in defence Mrs. Williamson testified that the first intimation of this outstanding claim that had been received was his account of 9th August 1943 (Ex. 11). She had then gone to see him, and Scott could not find the items of the account in his books. She produced a receipt from Scott, dated 20th June 1943, for \$69.45 (Ex. 12), in full of account.

Herbert Dunn testified that two or three weeks before 23rd July 1942, he was called up by Andrew Dunn, and on going over to his farm, found him crying. He, Andrew Dunn, told Herbert that the plaintiff Bell and MacKenzie were going to try "to put him away", and that it would kill him if he were taken away. He wanted Herbert Dunn to take over the management of the farm. Herbert Dunn told him he could not do so. The latter stated that he then wrote a letter to Andrew Dunn's two daughters, the defendants. Herbert Dunn also testified that Andrew Dunn had bought the farm in 1895 for \$6,000. He thought the farm was still worth that sum. He also stated that Andrew Dunn had on his farm at his death 25 head of pure-bred Holstein cattle, which he thought were worth \$2,500. He first learned of a claim by MacKenzie on 18th July 1942, but only learned of the nature of his claim from Mr. MacKenzie's letter of 20th July 1942 (Ex. 1).

The plaintiff made no attempt in the present action to prove MacKenzie's alleged claim against the late Andrew Dunn. Her counsel took the position that the issue as to whether the plaintiff's claim is or is not in whole or in part a valid claim appertains to the first action which is still pending and that the plaintiff was not obliged to prove the claim in the present action.

Counsel for the defendants argued that the plaintiff, not being a creditor (in the sense of being a judgment creditor) of the late Andrew Dunn, had no status to maintain the present action.

I am of opinion that the plaintiff has a sufficient status to maintain the present action. The claim asserted (whether it be valid or not, in whole or in part, is another matter) is one which arises *ex contractu*. It is asserted in an action which is still pending. The relevant provisions of The Fraudulent Conveyances Act, R.S.O. 1937, c. 149, are derived from the statute 13 Eliz. c. 5, and are in substance the same. The provision of that statute invoked (s. 2) is not alone for the protection of creditors but of creditors "or others". In *Hopkinson v. Westerman* (1919), 45 O.L.R. 208, 48 D.L.R. 597, the Court of Appeal for Ontario held that a person who had a right of action in tort, though no judgment had been recovered, was entitled to maintain an action under the statute. Middleton J., at pp. 213-4, said:

"But in order to make a transaction open to attack under 13 Eliz. ch. 5, it is not necessary that there should be an existing debt. The statute is for the protection of 'creditors and others', and in this respect differs from our Ontario statute, which avoids preferential transactions at the instance of 'creditors' only (Assignments and Preferences Act, R.S.O. 1914, ch. 134, sec. 5).

"Ever since *Longeway v. Mitchell* (1870), 17 Gr. 190, there has been no room for doubting that a class action will lie attacking a conveyance as fraudulent, either under the statute of Elizabeth or under the Provincial statute, without awaiting the recovery of judgment and issue of execution."

Claims *ex contractu* appear in this respect to be upon the same plane as claims *ex delicto*: *Hopkinson v. Westerman*, *supra*, at p. 210.

This decision was cited with approval in *Shephard v. Shephard*, 56 O.L.R. 555 at 557, [1925] 2 D.L.R. 897; *McMullen v. Dr. Barnardo's Homes National Incorporated Association* (1924), 26 O.W.N. 168 at 169. *Gay Co. Ltd. v. Trick* (1927), 31 O.W.N. 445 at 446, and in *Penny v. Fulljames*, [1920] 1 W.W.R. 555 at 557, 50 D.L.R. 553 at 554.

But in an action to set aside a conveyance by a debtor as being fraudulent under 13 Eliz. c. 5, the plaintiff, unless he be a

judgment creditor, must sue on behalf and for the benefit of all creditors: *Reese River Silver Mining Company v. Atwell* (1869), L.R. 7 Eq. 347; *Farley v. Farley* (1917), 11 O.W.N. 317; *Brown v. Weil*, 61 O.L.R. 55, [1927] 4 D.L.R. 218. The same rule applies where the action is brought under The Fraudulent Conveyances Act, R.S.O. 1937, c. 149; *Hopkinson v. Westerman*, *supra*; *Shephard v. Shephard*, *supra*. Para. 5 of the statement of claim and sub-paras. (1) and (2) of the prayer for relief therein, indicate that the plaintiff is really maintaining the action for the benefit of the plaintiff and other creditors of the late Andrew Dunn. Even so, the action is not under our practice properly constituted: See *In re Tottenham*; *Tottenham v. Tottenham*, [1896] 1 Ch. 628 at 629. The practice uniformly followed in Ontario is that it should be stated in the style of cause that the plaintiff is suing in a representative capacity: *Township of Barton v. City of Hamilton* (1909), 13 O.W.R. 1118 at 1128; *Barchard & Co. Limited v. Nipissing Coca Cola Bottle Works Limited* (1918), 42 O.L.R. 196 at 200.

The statement that the plaintiff sues on behalf of herself and all other creditors of the late Andrew Dunn should, accordingly, appear in the title of the action. The omission of such a statement in the style of cause is, however, a purely technical objection to the form of the action and an amendment will be allowed as a matter of course: *Barchard & Co. Limited v. Nipissing Coca Cola Bottle Works Limited*, *supra*; *Shephard v. Shephard*, *supra*, at 557 and *Gay Co. Ltd. v. Trick*, *supra*, and has been ordered to be made prior to the issuance of the judgment after trial: *Henderson v. Strang* (1918), 43 O.L.R. 617, reversed 45 O.L.R. 215, 48 D.L.R. 606, which was affirmed 60 S.C.R. 201, 54 D.L.R. 674, [1920] 1 W.W.R. 982. I, accordingly, grant the plaintiff leave to amend the style of cause if she should be advised so to do.

I propose to assume, for the purposes of this judgment, that an appropriate amendment of the style of cause will be made.

As the plaintiff seeks in the present action to set aside the conveyance and bill of sale referred to above, as being fraudulent, without first obtaining judgment and execution on her claim, it is to be noted that her relief in this action, should it be successful, is confined to setting aside the impeached conveyance: *Mitchell v. Jeffrey et al.*, [1944] O.W.N. 540 at 542; *Oliver v. McLaughlin et ux.* (1893), 24 O.R. 41; *Taylor et al. v.*

Cummings et al. (1897), 27 S.C.R. 589. See also *Longeway v. Mitchell* (1870), 17 Gr. 190 at 193.

In her statement of claim, the plaintiff alleges (para. 4), and at the trial her whole case was presented upon the footing, that the deed of conveyance and the bill of sale in question had not been made for valuable consideration, but were simply voluntary and therefore fraudulent and void as against the late James Hugh MacKenzie and other creditors, if any, of the late Andrew Dunn. If this view of those transactions were well founded, the plaintiff's case would, no doubt, rest upon a stronger footing than if the deed and bill of sale had been made for valuable consideration. In *Goodwin v. Williams* (1856), 5 Gr. 539 at 542, Chancellor Blake, dealing with the contention that a voluntary settlement was void under the statute 13 Eliz. c. 5, quoted the judgment of the Lord Chancellor in *French v. French* (1855), 2 Jur. N.S. 169, where the learned Lord Chancellor said:

"Now the first question is, what is to be held to be an indication that a person making a settlement which is to be voluntary is thereby intending to defeat or delay creditors? If the settlement is made by a person who, if he had not made the settlement, would have had property upon which creditors might immediately fasten and pay themselves, but which, by the settlement being made, is withdrawn, that, *prima facie*, is an act which must delay them . . . If the immediate effect is to withdraw assets that are immediately available, so that they are placed beyond the reach of the creditors, this is clearly a delaying within the meaning of the statute."

Under such circumstances, the attempt to delay or hinder creditors is by law inferred or presumed, and no proof of such intention is required: *The Sun Life Assurance Company of Canada v. Elliott* (1900), 31 S.C.R. 91 at 95; *Campbell v. Chapman* (1879), 26 Gr. 240 at 242; *Irwin v. Freeman* (1867), 13 Gr. 465; *Buckland v. Rose* (1859), 7 Gr. 440. But that is so only when the circumstances are such that the voluntary settlement necessarily would have effect to defeat or delay creditors: See *Freeman v. Pope* (1870), L.R. 5 Ch. 538; *Doty v. Marks*, 55 O.L.R. 147 at 153, [1924] 3 D.L.R. 687, and other decisions there cited.

It appears to be established by decisions of long standing "that a voluntary settlement is not *per se* fraudulent: that fraud is always a question between those claiming under the settlement,

and creditors: that the existence of indebtedness at the time, and the amount of that indebtedness considered with reference to the debtor's means of payment are most material considerations, and that a settlement may be fraudulent even if there be no indebtedness at the time, if made with the intention of defeating those to whom the settlor intends to become indebted": *Buckland v. Rose*, *supra*, at p. 442; *Goodwin v. Williams*, *supra*; see also *Ex parte Mercer*; *In re Wise* (1886), 17 Q.B.D. 290.

The governing principle was enunciated by the Privy Council (opinion of Sir Barnes Peacock) in *Godfrey v. Poole et al.* (1888), 13 App. Cas. 497 at 503, in the following passage of the judgment: "It may, however, be stated, as regards the statute 13 Eliz. c. 5, that the rule was correctly laid down by the late Vice-Chancellor Kindersley in the case of *Thompson v. Webster* (1859), 4 Drew. 628, 62 E.R. 241, in which he says:

"The principle now established is this:—The language of the Act being, that any conveyance of property is void against creditors if it is made with *intent* to defeat, hinder, or delay creditors, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the *intention* of the settlor in making the settlement was to defeat, hinder, or delay his creditors'."

For instance "the mere proof of the existence of particular debts prior to a voluntary settlement does not, without more, establish fraudulent intent, and thus invalidate the settlement . . . it is necessary to shew such a state of the settlor's affairs at the time of the settlement as would lead the Court to infer that the effect of the settlement was to defeat or delay creditors, and that, therefore, such was the settlor's fraudulent intent." *Dancey v. Brown* (1914), 31 O.L.R. 152 at 157, 19 D.L.R. 862. See also *Doty v. Marks*, *supra*, at pp. 153-4.

In deciding whether a disposition of property is fraudulent against creditors, all the circumstances at the time the instrument was made are to be looked at, and not subsequent events, except those which must be taken to have been in contemplation at the time of the transfer of the property and from which a fraudulent intention at that time may be gathered: *Donohoe v. Hull Bros. & Co. et al.* (1895), 24 S.C.R. 683 at 693. Moreover, upon the question of fact, whether the intention was or was not to defeat, hinder or delay the claimant, it may be a matter of consequence what the character of the claim was and what the prospects of success in it, as is exemplified in the mariner's case,

Ex parte Mercer, supra; Hopkinson v. Westerman, supra, at pp. 210, 214.

In the present case, these circumstances adduced in evidence are not without significance as bearing upon the character of the claim of the late James Hugh MacKenzie; and his chances of successfully impeaching the conveyances in question:

(1) On the evidence of the plaintiff herself, she had never, during her ten years' residence on the farm, heard MacKenzie mention any claim he had against the late Andrew Dunn until the very day he left the farm, and that was a claim only for the items amounting to \$750 set out in Ex. 9. Moreover, Mrs. Williamson testified that MacKenzie had told her that her father had no debts.

(2) It would appear that some fifteen years prior to his leaving the farm, MacKenzie suffered a stroke and thereafter, on the evidence of the defendant Williamson, he spent about one-quarter of his time in bed and when he was up could do only light chores, such as milking cows, peeling potatoes and carrying water. This evidence was corroborated by that of Herbert Dunn who saw MacKenzie regularly during his last fifteen years on the farm.

(3) MacKenzie never issued a writ against the late Andrew Dunn, but died by suicide on 8th October 1942, after having made several trips out to the Dunn farm in an endeavour to have Mr. Dunn take him back and keep him on the farm: examination for discovery of the plaintiff (qq. 59, 60, 61, 62, 63).

(4) The defendants, acting against legal advice, offered, without prejudice and purely on compassionate grounds, to pay MacKenzie \$750 in satisfaction of the only claim that he mentioned on the day he left the farm, but this offer was refused. This offer was made by letter dated 21st July 1942 (Ex. 6), prior to the execution of the deed and bill of sale in question, but it was only after the execution, filing and registration of those instruments that the late Andrew Dunn or the defendants were advised of MacKenzie's refusal to accept the offer: letter of 24th July 1942 (Ex. 7).

(5) Mrs. Williamson testified that her father had no creditors, and while an attempt was made at the trial to prove an outstanding claim for a small amount on the part of one Scott of Ingersoll against the late Mr. Dunn, the evidence adduced established that this claim had been paid in full. Hence, apart from the late Mr. Dunn's doubtful liability on the claim asserted

by MacKenzie, on the day he left the farm, and shortly thereafter, the evidence showed that he owed no outstanding debt at the date the impeached conveyances were made.

In the light of these elements of the evidence, even if it be assumed that the deed and bill of sale were voluntary and not made for valuable consideration, it is, I am disposed to think, very doubtful that the Court would be justified in concluding that those conveyances were made with intent to defeat, hinder, delay or defraud "creditors or others" of their just and lawful suits, debts or damages: *Ex parte Mercer, supra*, at p. 294, where Cave J. said:

"It must be remembered that the settlor had no creditor whatever at the time when the settlement was made. He had no debt. There was merely a liability which might or might not result in a debt. I do not think that the decisions . . . have ever been held to apply where there is nothing more than a liability of this nature."

However, entirely apart from that view of the case, I am of opinion that the deed and bill of sale were in point of law not voluntary, but were made for good or valuable consideration; and if this opinion be right, it is well settled that the plaintiff, in order to be entitled to succeed, would have to prove that these conveyances were made with intent to defraud: *Hopkinson v. Westerman, supra*, at pp. 213-4, and cases there cited.

The deed in question (Ex. 4) was expressed to be in consideration of "natural love and affection and the sum of One dollar" and included the following covenant on the part of the grantees:

"The grantees hereby agree to pay, in equal shares, taxes and all other rates, charges, and encumbrances affecting said lands and premises, (including insurance), and make necessary repairs to same out of the income or revenue therefrom so long as they are in occupation or possession thereof, also likewise to provide the grantor (who shall have the full right, use and privilege of residing upon said lands and premises for and during the term of his natural life in conjunction with the grantees herein) with a suitable home together with proper board, clothing, and necessary medical and nursing services during the term of his natural life, and also, similarly, to pay the funeral expenses of the said grantor."

The obligation assumed by the grantees under this covenant must be held, in view of the pertinent decisions, to have con-

stituted valuable consideration. The covenant is distinguishable from the one which was considered in *Anderson v. Bradley* (1921), 51 O.L.R. 94, 64 D.L.R. 707, and was held to amount to a mere reservation in favour of the grantor of a right of residence upon the land. It appears rather to be *in consimili casu* with the covenant which was considered by Rose J. in *Campbell v. McDonell* (1927), 33 O.W.N. 246. Of that covenant, Rose J., at p. 247, said:

" . . . it was a positive covenant by John Alexander to maintain his mother, not necessarily upon the farm, and it is consideration for the conveyance. The consideration being present and the transaction being a real one, the case is not to be made to turn upon any practice of demanding corroboration of the evidence of the grantee or of insisting upon the defence calling both the grantor and the grantee as witnesses. It is a case in which the Court must endeavour, upon such evidence as there is, to reach a conclusion as to what really was in the minds of the parties to the conveyance: *Kearney et al. v. Jack* (1912), 41 N.B.R. 293, 11 E.L.R. 401, 10 D.L.R. 48; *Shephard v. Shephard*, 56 O.L.R. 555, [1925] 2 D.L.R. 897. The existence of a concurrence of fraudulent intent was not established. Whatever the truth may be as to the grantor, the strong probability is that the grantee (a purchaser for value) was innocent."

Moreover, it is a covenant of the same character as that considered by the Supreme Court of New Brunswick in *Doe d. Keith v. Corey* (1890), 29 N.B.R. 287 at 293, where Tuck J. said:

"If the consideration of a deed is to support and maintain the grantor, and is made *bona fide*, with no intention to defeat and delay creditors, such a deed is a good one, even if the making of it has prevented creditors getting their pay."

In *Gale v. Williamson* (1841), 8 M. & W. 405, 151 E.R. 1096, a father by deed assigned to his son "in consideration of natural love and affection" his dwelling house and all his personal estate. In an action by the son against the sheriff, for levying on goods, part of such estate, under a *fi. fa.* against the father, the Court of Exchequer held that it was competent to the plaintiff to prove *aliunde* that by a bond, bearing even date with the deed of assignment, he bound himself to maintain his father's wife and children; and, the jury having found that the bond was a part of the same transaction and that the deed of assignment was *bona fide*, the Court further held that valuable consideration for the deed of assignment had been proved by the plaintiff and

the assignment was therefore not void as against creditors under the statute 13 Eliz. c. 5; see also *Montgomery v. Corbit* (1896), 24 O.A.R. 311.

If the obligation of the grantees under the covenant in question constituted valuable consideration for the grant made to them, as I have concluded, the courts will not weigh too nicely, or as it was held in one case, *Roe d. Hamerton v. Mitton* (1766), 2 Wils. 356*n*, 95 E.R. 856, "in diamond scales", the adequacy of the consideration. If the consideration is valuable and not so entirely inadequate as from its insufficiency to induce the presumption of fraud, it is enough: May on Fraudulent Conveyances, 2nd ed. 1887, p. 247.

In the actual event, in the present instance, the covenant did not turn out to be particularly onerous as the late Andrew Dunn died about a year and a half after the deed and bill of sale were made. He might possibly have lived longer so as to render the burden of the covenant a heavier one. How long he would continue to live was, of course, at the date the conveyances were made, wholly unforeseeable. In any case, the evidence adduced at the trial, in my opinion, fell far short of what would be required to establish that the deed and bill of sale were made to defeat, hinder, delay or defraud creditors or others. Indeed, the evidence satisfies me that the whole transaction was a perfectly honest and prudent arrangement, having regard to the late Mr. Dunn's age and condition of health and the other surrounding circumstances. It was made, I am satisfied, with no fraudulent intention of defeating creditors or others. Where once the Court is convinced of the actuality of the transaction and that valuable consideration has been given, the plaintiff cannot succeed in an action to have the transaction declared fraudulent and void as against creditors without actually proving an intention to defraud creditors of the grantor, and this proof must be based upon something far beyond mere suspicion. Suspicion will not shift the onus from the plaintiff: *Shephard v. Shephard*, *supra*, at p. 558, per Middleton J.A.

The plaintiff's claim therefore fails and the action must be dismissed with costs.

Action dismissed with costs.

Solicitors for the plaintiff: MacDougall & Whaley, Woodstock.
Solicitors for the defendants: Clark & Zeron, Windsor.

[COURT OF APPEAL.]

Gasner v. Bellak Brothers Limited.

Landlord and Tenant—Lease for One Year, with Option of Renewal—No Provision as to Time or Manner of Exercising Option—Effect of Tenant Continuing in Possession, with Payment and Acceptance of Rent at Same Rate and Times—Constitution of New Tenancy thereafter—Notice to Vacate—Wartime Controls.

The presumption that a tenant who continues in possession after the expiration of the term of his tenancy, at the same rent, thereby becomes a tenant from year to year, is not a conclusive one, and may be rebutted by circumstances excluding the implication of a yearly tenancy. *Young v. Bank of Nova Scotia* (1915), 34 O.L.R. 176; *Right d. Flower v. Darby and Bristow* (1786), 1 Term Rep. 159, referred to. Whether the circumstances do exclude such an implication is a question of fact, to be decided on the circumstances of each case. *Finlay v. The Bristol and Exeter Railway Company* (1852), 7 Ex. 409, referred to.

A lease was made "for a period of one year with the option of renewing for a further term of two years". No notice was given by the tenants that they were exercising the option of renewal, but they remained in possession after the end of the year, and paid rent, which was accepted by the landlord, at the same rate and times. Shortly before the end of the additional two years, the landlord demanded possession of the premises "when your lease expires on the 31st day of May next". The term was extended, under wartime regulations, for two further periods of one year each, and then for an additional period expiring on 30th November 1944. Early in November the landlord's solicitor advised the tenants that he had agreed to accept them as monthly tenants after 30th November, and they continued in possession after that date.

Held (HENDERSON J.A. dissenting), the tenancy after 30th November was a monthly tenancy, and was terminable by the landlord on one month's notice. It must be held, in the particular circumstances of the case, that the tenants had exercised their option of renewal, and had therefore remained, after the first year, not as tenants from year to year, but as tenants for a term certain of two years. The lease had been extended for further terms certain, but at no time had there been such overholding as to raise the presumption of a tenancy from year to year.

Per LAIDLAW J.A.: The effect of the option in the lease was to give the lessees a present right, which, since there were no express provisions in this respect, was exercisable at any time, even after the expiration of the first year, so long as they remained in possession with the sanction of the lessor. *Guardian Realty Company of Canada v. John Stark & Company* (1922), 64 S.C.R. 207, applied. The existence of the option, together with the other circumstances of the case, rebutted the presumption of a tenancy from year to year after the first term certain of one year. It had been held in the United States of America that where the lease contained an option, with no requirement of notice of exercising it, exercise would be implied from the mere fact that the lessee continued in possession after the expiration of the term.

AN APPEAL by a landlord from the order of Lovering Co. Ct. J., in the County Court of the County of York, dismissing an application for possession. The facts are fully stated in the reasons for judgment of ROACH J.A.

6th April 1945. The appeal was heard by HENDERSON, LAIDLAW and ROACH JJ.A.

W. M. Gordon, for the landlord, appellant: The tenancy was only a tenancy at sufferance: *Re Lyons and McVeity* (1919), 46 O.L.R. 148, 49 D.L.R. 635. In the alternative, it was a tenancy from month to month, and validly terminated by the notice given: *Eastman v. Richard & Co.* (1899), 29 S.C.R. 438. In the case of a lease with an option of renewal, such as the present one, no formal exercise of the option is required: *Brewer v. Conger* (1900), 27 O.A.R. 10; *Hoadley v. Bayntun* (1915), 31 W.L.R. 751; *Laba v. McGovern* (1918), 52 N.S.R. 440, 44 D.L.R. 551.

H. S. Rosenberg, for the tenant, respondent: There was no exercise of the option, and the tenancy became one from year to year after the expiration of the first term certain of one year. *Brewer v. Conger*, *supra*, decides only that a desire to renew *may* be shown by conduct, and in *Laba v. McGovern*, *supra*, the wording of the option itself distinguishes it from the case at bar. The staying on did not constitute an exercise of the option: *Buckland v. Papillon* (1866), L.R. 2 Ch. 67. [LAIDLAW J.A.: If there was a tenancy for a term certain subsisting in 1942, is not the effect of Order No. 74 of the Wartime Prices and Trade Board to make the renewal at that time one for a further term certain of one year, to expire in April 1943?] Had the tenant been in occupation for a term certain, that would be so. But the notice given in 1942 was not a compliance with Order No. 74. [LAIDLAW J.A.: Your letter did expressly ask for a renewal.]

W. M. Gordon, in reply.

Cur. adv. vult.

29th May 1945. HENDERSON J.A. (*dissenting*):—An appeal from the order of His Honour Judge Lovering, in the County Court of the County of York, dated 26th February 1945.

The respondents became tenants of the landlord under the provisions of an agreement dated 12th May 1939, as follows:

“Mr. P. E. Rivett,

TORONTO.

“Dear Mr. Rivett:

“Messrs. Rudolph and Wilhelm Bellak of the Empire Chemical Co., hereby agree to lease from you for a period of one year with the option of renewing for a further term of two years, the second floor of your building at 1191 Bathurst St.,

consisting of approximately 8,000 square feet; price to be \$1,200.00 per annum payable monthly at the rate of \$100.00 per month.

"You are to whitewash all the walls and ceiling and to clean the flat so occupation can be effected as soon as possible. Your lease to be dated June 1st, occupation to be made as soon before that as is necessary.

"Yours truly,

"M. Simmons"

and entered into occupation of the premises in question.

At the expiration of the period of one year certain the tenants did not exercise the option of renewing for a further term of two years, nor have they at any time since exercised that option, but they did continue to occupy the premises and to pay rent, at the rate provided in the agreement, and thereby became tenants from year to year.

On two occasions the landlord has made efforts to obtain a writ of possession, apparently in consequence of having received an offer for sale of the premises, but on both occasions the Court before which the matter came held that the notice given was insufficient, it not being the six months' notice terminating with the year of the tenancy.

On 19th May 1944, an order was made by the Minister of Munitions and Supply, said to be made pursuant to the powers vested in him by Order in Council P.C. 3242, dated 22nd April 1943 ([1943], 2 C.W.O.R. 226), and other powers in that behalf, which provides that the tenants shall be allowed to retain possession of the premises until 30th November 1944, and upon the expiration of that order no further order was made by the Minister.

In my view this order had no effect upon the legal position of the parties, that is to say, that the tenants are tenants from year to year, except at most to prevent the landlord from attempting to oust the tenants during the period when the order was in force. It is further my view, after a careful perusal of all the material contained in the appeal book and upon the evidence, that nothing which has occurred has been sufficient to disturb the legal relations of the parties, and the tenants are still tenants from year to year. That being so, the notice upon which the present proceedings are founded is insufficient. The appeal therefore fails, and must be dismissed with costs.

LIDLAW J.A.:—This is an appeal by a landlord from an order of His Honour Judge Lovering, in the County Court of the County of York, dated the 26th day of February 1945, dismissing an application made under the provisions of The Landlord and Tenant Act, R.S.O. 1937, c. 219, for an order for possession of certain premises in the city of Toronto.

The facts have been set out in detail by my brother Roach, and I propose to refer only to such of them as, in my opinion, particularly relate to the question to be determined by the Court. That question is this: Was a notice in writing, dated the 26th day of December 1944, from the solicitor for the landlord to the tenant, good and sufficient to terminate the tenancy at or before the end of January 1945? The answer to the question requires determination of the nature of the tenancy at the time the notice was given. It also requires consideration of certain Canadian war orders and regulations from time to time in force during the occupancy of the premises.

It will be convenient to consider and discuss the occupancy in periods of time from the commencement of the tenancy, and without regard to the identity, or lack of evidence thereof, of the landlord and tenant. There is much confusion and uncertainty at times as to the names and identity of both the landlord and the tenant.

From 1st June 1939 to 1st June 1940, the occupant was a tenant for a term certain (one year) upon the terms and conditions contained in a letter signed "M. Simmons" and addressed to "Mr. P. E. Rivett", dated the 12th May 1939. That letter reads in part as follows:

"Messrs. Rudolph and Wilhelm Bellak of the Empire Chemical Co., hereby agree to lease from you for a period of one year with the option of renewing for a further term of two years, the second floor of your building . . ."

It is to be particularly noted that the option in favour of the lessee does not provide any time or manner in which it may be exercised. The lessee acquires a present interest defeasible only by his election to discontinue possession, and the option can be exercised at any time after the lease expires, so long as the lessee remains in possession with the sanction of the lessor: *Guardian Realty Company of Canada v. John Stark & Company* (1922), 64 S.C.R. 207 at 212-3, 70 D.L.R. 333.

From 1st June 1940 to 1st June 1942, the tenant continued to occupy the premises with the consent of the landlord. I assume, and it is not questioned, that the tenant continued to pay the same rent and in the same manner periodically as in the first year of tenancy. It becomes of the very essence of the question in issue to decide whether the tenant exercised the option to renew the lease for a further term of two years, and in consequence became a tenant for a term certain ending on 31st May 1942, or whether after 1st June 1940 the tenancy was one from year to year created by presumption of law. If the tenancy during this period was one from year to year, as contended by counsel for the respondent, it has never been effectively terminated by the landlord, and this appeal would accordingly fail. But I hold the view that during this period the tenancy was one for a term certain, which would end without notice of termination, but by efflux of time. It is well established that "a tenant who holds over after the expiration of his lease and pays rent, in the absence of facts pointing to a contrary conclusion, is held as a matter of law impliedly to have agreed to hold as tenant from year to year upon such terms of the old lease as are applicable to such a tenancy": see 20 Halsbury, 2nd ed. 1936, p. 127. But the mere fact of holding over and payment of rent is not conclusive as to the creation of a tenancy from year to year; it is only evidence of such tenancy; whether the circumstances exclude the implication of a yearly tenancy is a question of fact to be decided on the circumstances of the case: *Finlay v. The Bristol and Exeter Railway Company* (1852), 7 Ex. 409 at 417, 420. See also 20 Halsbury, 2nd ed., p. 128.

The presumption of tenancy from year to year does not, in my opinion, necessarily become effective under circumstances where a tenant holds over after the expiration of his lease and pays rent, when the lease under which the tenant was in possession provides expressly for a renewal thereof at the option of the tenant, without specifying either the time or the manner in which the option may be exercised. The right vested in the lessee is to accept or reject an offer made to him by the lessor. The fact of acceptance or rejection may be found by the application of principles well established in the law of contract, and may, in the absence of any contrary provision, be established from the conduct of the lessee. I think that the circumstances

in this particular case amply support my finding that the lessee exercised the option of "renewing for a further term of two years", as provided in the letter dated 12th May 1939, *supra*. His acts and conduct are referable to the right possessed by him under the lease, and do not depend upon or arise from a presumption in law. I think that his election to exercise his option of renewal is constituted by his continuance in possession, the payment of rent in the same manner, amount and intervals, the absence of any evidence showing a desire or intention on the part of the tenant to forego his right of renewal, and, finally, from correspondence to which I now make particular reference. On 24th February 1942 "P. E. Rivett" (who I assume was the landlord) notified "Bellak Bros. Ltd." to vacate and deliver up possession of the premises "when your lease expires on the 31st day of May next." In reply the solicitor for the tenant notified Mr. Rivett in part as follows: "Messrs. Bellak wish to continue in possession of the property at the expiration of the lease, and they wish to give you notice that they desire to renew the lease on the same terms, for a further period of three years from the expiration thereof." This communication on behalf of the tenant is, I think, quite inconsistent with possession as a tenant from year to year. On the contrary, it is consistent only with a tenancy for a term certain expiring 31st May 1942, with the exercise of the option for renewal for a term ending on that date.

It is my view that under such circumstances the tenant cannot now successfully maintain that the option was not exercised, and that the tenancy on and after 1st June 1940 was from year to year.

I find that the question under discussion has been the subject of consideration and judgment in many cases in the United States of America. See *Corpus Juris*, vol. 35, p. 1036, art. 175. See also Wood on Landlord and Tenant, 2nd ed. 1888, p. 947, from which I quote:

"If the lease does not provide that notice shall be given by the tenant of his election [to exercise an option to renew], merely remaining in possession after his term has expired is sufficient, and binds both him and the landlord for the additional term."

In *Foster v. Mulcahey* (1921), 196 App. Div. 814 at 817, it is stated, *per* Davis J.: "In the case where the tenant has the

option to renew and there is no particular method prescribed in the lease for giving notice of the exercise of the option, a tenant may adopt any reasonable method at the end of his term to indicate that he elects to renew the lease. He may give the notice orally or in writing, or his election may be implied from his holding over." See also *The Insurance & Law Building Company v. The National Bank of Missouri* (1879), 71 Mo. 58 at 61, affirming (1878), 5 Mo. App. 333. I refer also to *Laba v. McGovern* (1918), 52 N.S.R. 440, 44 D.L.R. 551, in which it was held that the tenant, under the circumstances then in question, must be taken as remaining under his option (of continuing the lease), and was not an overholding tenant within the meaning of The Overholding Tenants Act, R.S.N.S. 1900, c. 174. Chief Justice Harris of the Supreme Court of Nova Scotia, adopts the reasoning of the Court in *Delashman v. Berry* (1870), 20 Mich. 292, and Mellish J. discusses at length certain decisions of the courts in England.

In the absence of special circumstances the tenancy after 1st June 1940 would end, as I have stated, on 31st May 1942, but special circumstances did exist. The landlord gave a notice to vacate dated 24th February 1942. The tenant thereupon gave notice of renewal dated 3rd March 1942. In consequence and by virtue of regulations contained in Order No. 74 of the Wartime Prices and Trade Board, dated the 16th day of December 1941 (75 Canada Gazette 2540), and amendments thereof, the tenancy was extended for a term certain of one year.

Thus, from 1st June 1942 to 1st June 1943, the tenant was in possession for a term certain ending, in the ordinary course of events, by expiration of time. But again notice to vacate was given by the landlord and notice of renewal by the tenant. And again, by operation of the provisions contained in Order No. 108 of the Wartime Prices and Trade Board (75 Canada Gazette 4544), which came into force on 24th April 1942, in substitution for Order No. 74, *supra*, the lease was extended for a further term certain of one year. Consequently, from 1st June 1943 to 1st June 1944 the tenancy was for a term certain and, as before, would end without notice unless special circumstances intervened. The special circumstances in this instance were as follows: on 19th May 1944 the Minister of Munitions and Supply, purporting to act pursuant to the powers vested in him by Order in Council P.C. 3242, dated the 22nd day of April 1943 ([1943]

2 C.W.O.R. 226), made an order that "Bellak Brothers Limited . . . shall be allowed to retain possession of the said premises until November 30th, 1944".

The tenant thus acquired the right to remain in possession of the premises until 30th November 1944, but was not given any right to remain thereafter, either by further order of the Minister, or by virtue of any regulations extending or providing for a renewal of the term. There were no such regulations then in force, Order No. 108, *supra*, having been revoked on the 1st October 1943, by Order No. 315 of the Wartime Prices and Trade Board ([1943] 4 C.W.O.R. 818).

After 30th November 1944, the rights of the parties and the nature of the tenancy depend on particular facts and circumstances. The tenant was informed in writing by the landlord that the term of tenancy expired on 30th November. A representative of the Department of Munitions and Supply also informed the tenant that the operation of the order dated 19th May 1944, *supra*, would end on 30th November, and that arrangements had been made by him with the landlord for a monthly tenancy thereafter. The tenant expressed his approval thereof, and according to the representative of the Department of Munitions and Supply, the tenant stated to him, "That would be fine", and "They [the tenants] were satisfied as far as the monthly tenancy."

On 9th November 1944 the solicitor for the landlord notified "Rudolph and Wilhelm Bellak" (who I again assume were the tenants), "I have today on behalf of Mr. Gasner agreed with the Department to accept you as a monthly tenant pending consideration of this matter by us and the Department."

I interpret this notice to the tenant to mean this: "I am willing that you should remain as a tenant after 30th November 1944 as a monthly tenant". It was in effect an offer to the tenant and capable of acceptance by conduct of the tenant. There was no refusal by the tenant to accept a tenancy of that kind, but on the contrary, in my opinion, the continuance in possession and payment of rent monthly by the tenant constituted an acceptance by him of the offer made by the landlord. There was thus a monthly lease for a non-certain term commencing 1st December 1944. Under these circumstances the solicitor for the landlord, on 26th December 1944, notified Bellak

Brothers Limited "to quit and deliver up possession of the premises . . . on or before the end of January, 1945." This notice was sufficient in law to terminate the tenancy, subject only to Order No. 470 of the Wartime Prices and Trade Board ([1945] 1 C.W.O.R. 43), which came into force on 2nd January 1945. That order amends Order No. 315, *supra*, and provides in part as follows:

"12. Except as provided in Sections 13 and 14, no tenant of any commercial accommodation shall be dispossessed of such accommodation or be evicted therefrom and no landlord shall demand that any tenant vacate or deliver up possession of any commercial accommodation.

"13. The landlord may recover possession of the accommodation in accordance with the law of the province in which it is situated if the tenant

"(j) is in possession under a lease that is not for a term certain and has been given before January 2, 1945 a notice to vacate in accordance with the law of such province".

The conditions quoted in s. 13(j) are fully satisfied in this case. The tenant was in possession after 30th November 1944, under a lease that was not for a term certain, and notice to vacate in accordance with the law of this Province had been given to him before 2nd January 1945. My conclusion, therefore, is that the tenancy was properly terminated on 31st January 1945, by the notice from the solicitor of the landlord dated 26th December 1944, referred to above.

My opinion accordingly is that the appeal should be allowed, that the order of His Honour Judge Lovering dated the 26th day of February 1945 should be set aside, and that an order for possession of the premises should be made. The appellant ought to be allowed costs in this Court and in the court below.

ROACH J.A.:—This is an appeal from the order of His Honour Judge Lovering, County Judge of the County of York, dismissing an application of the landlord made under Part III of The Landlord and Tenant Act, R.S.O. 1937, c. 219, for an order for possession of certain commercial accommodation on Bathurst Street in the city of Toronto.

The appellant is the present owner of the premises in question. His predecessor in title was one Rivett. There is nothing

in the record to show when the respondent company came into existence, or when it first began to occupy these premises.

The first document in the record is a letter dated 12th May 1939, addressed to P. E. Rivett and signed "M. Simmons." Who Simmons was, or what his authority was, does not appear. The relevant parts of the letter are as follows:

"Messrs. Rudolph and Wilhelm Bellak of the Empire Chemical Co., hereby agree to lease from you for a period of one year with the option of renewing for a further term of two years, [the premises therein described]; price to be \$1,200.00 per annum payable monthly at the rate of \$100.00 per month.

...

"Your lease to be dated June 1st, occupation to be made as soon before that as is necessary."

Apparently no formal lease was executed, and it does not appear that any written or verbal notice was given of an intention to exercise the option. There is nothing to show whether or not Messrs. Bellak ever went into possession. However, through a course of events commencing with that original letting, and which I will later trace, the respondent became the tenant and it is now, and is claiming a right to continue, in possession.

The next document in the record is a notice, dated 24th February 1942, signed by Rivett and addressed to the respondent, reading as follows:

"Please take notice that you are required to vacate and deliver up to me possession of the flat which you hold of me at 1191 Bathurst St. Toronto, when your lease expires on the 31st day of May next."

This is followed by a letter from Mr. Rosenberg, dated 3rd March 1942, addressed to Rivett, acknowledging receipt by the respondent of the notice dated 24th February, and saying:

"Messrs. Bellak wish to continue in possession of the property at the expiration of the lease, and they wish to give you notice that they desire to renew the lease on the same terms, for a further period of three years from the expiration thereof."

Order No. 74 of the Wartime Prices and Trade Board (75 Canada Gazette 2540) was passed on 16th December 1941, and became effective on 30th December 1941. Certain of its provisions have to be considered. They are as follows:

Section 16(1): "Subject to the provisions of Sections 18 and 19 hereof, a tenant now or hereafter occupying any commercial or housing accommodation shall be entitled to renewal of his lease on the same terms and conditions unless it is a lease for a 'term certain' of less than three months, provided that he gives to the landlord a notice of renewal in accordance with the provisions of subsection (2) of this Section".

Section 16(2): "Any notice of renewal given by a tenant shall be in writing and may be given at any time before or after receipt of a notice to vacate . . . but shall be given not later than the following time;

"(b) in the case of a lease from year to year, not later than thirty days after receipt of a notice to vacate;

"(e) in the case of a lease for a 'term certain' of six or more months, or of one or more years, not later than thirty days after receipt of a notice to vacate".

Section 17(1): "If a lease is renewed under the provisions of this Order, the period of renewal, in the absence of agreement to the contrary, shall be as follows:

"(b) the renewal of a lease for a 'term certain' of three months or longer shall be for a further 'term certain' of one year."

Section 18 refers to housing accommodation.

Section 19(1): "Notwithstanding the provisions of Section 16 hereof, a tenant of commercial accommodation shall not be entitled to a renewal of his lease . . . (ii) if, on the application of the landlord made before or after he receives a notice of renewal, the Court is satisfied that due notice to vacate, unless dispensed with under the provisions of this Order, has been given by the landlord",—and that certain other conditions therein enumerated obtain—"and, upon being so satisfied, the Court may order that possession shall be delivered to the landlord at the end of the term."

Section 21(1): "Any notice to vacate given by a landlord shall be in writing and shall be given within the following time:

"(a) In the case of a lease of commercial or housing accommodation not for a 'term certain', not later than the time prescribed by the law of the province in which the commercial or housing accommodation is situated".

Assuming for the moment that the respondent was the tenant in possession in February 1942—and as to that there is

considerable confusion in the record, to which I will make reference later—it is important to determine whether it was then in possession as a tenant from year to year, or for a term certain expiring on 31st May 1942. That will depend upon whether or not the option contained in the original letter was in fact exercised. That must be the starting-point. If it did not exercise that option, then by remaining in possession after 31st May 1940 it became a tenant from year to year, and nothing subsequently occurred to alter that position.

Before stating my conclusion it may be well to recount what occurred subsequent to 3rd March 1942, that being the date of Mr. Rosenberg's letter already referred to.

Apparently relying on s. 19, *supra*, the landlord Rivett made an application to the Court in April 1942. The application was heard by His Honour Judge Honeywell, who made an order dated 16th April 1942, dismissing that application. That order was filed as an exhibit in the proceedings before Judge Lovering. Certain features thereof are not without importance. It is entitled:

"IN THE MATTER OF a lease of the second floor of commercial building located at 1191 Bathurst St., Toronto, by Percy E. Rivett to Rudolph and Wilhelm Bellak, dated May 12th, 1939, for a period of one year with an option of two more years, said option being duly exercised and tenancy thereunder expiring May 31st, 1942."

The recital is also important. "It is, in part, as follows:

"Upon the application of Percy E. Rivett for an order for the delivery up of possession to him on May 31st, 1942, by Bellak and Bellak of premises . . . and upon hearing counsel for . . . Bellak and Bellak."

What is the effect of and the conclusions to be drawn from that order? First, the landlord in that proceeding was alleging that Bellak and Bellak were the tenants in possession, although he had addressed the notice to vacate to the limited company. Secondly, the landlord was alleging that the option had been exercised and a term thereby created which expired on 31st May 1942. The application having been dismissed, no matter what the reasons were, the right of the tenants—whoever they were, either Messrs. Bellak or the limited company—remained to be determined by the laws of the Province, except in so far as they might be affected by the provisions of Order No. 74.

Order No. 108 of the Wartime Prices and Trade Board (75 Canada Gazette 4544) was passed on 24th April 1942, and became effective on 25th April 1942. It revoked Order No. 74. In May 1942 Rivett applied to the Court, under a provision in Order No. 108, for an order dispensing with service of a notice to vacate, and for a further order of possession. The application was heard by His Honour Judge Robb, and was dismissed. Judge Robb's order has also been filed as an exhibit. It is not without significance that on that application Rivett was seeking possession from Bellak and Bellak.

On or about 17th February 1943, one Louise C. Rivett, then claiming to be landlord, served a notice to vacate on "Bellak Bros. & Simmons Limited" at 1191 Bathurst Street, demanding possession of the premises here in question on 31st May 1943, setting forth certain reasons which the landlord alleged came within provisions contained in Order No. 108, entitling a landlord to possession, those reasons being, briefly, that the tenant was committing a nuisance not contemplated by the lease and was not taking reasonable care of the accommodation, thereby causing it to deteriorate, and that prior to 30th December 1941, and "also prior to the date of the renewal of your lease requested by you" the landlord had given an option to International Lithographing Company Ltd. as prospective tenant, and that the option had been exercised by it, and that the landlord was accordingly bound to deliver possession to International Lithographing Company Ltd.

To that notice Bellak Brothers & Simmons Ltd. replied by a notice dated 22nd February 1943, denying the allegations set forth in the notice to vacate and stating as follows:

"Reserving all our rights, we herewith give you notice, under the provisions of Order No. 108 of the Wartime Prices and Trade Board respecting Maximum Rentals and Termination of Leases, that we desire to renew our lease in accordance with the provisions of the said Order, at the basic maximum rental and you are required to apply to the Court as provided in said Order No. 108".

Louise C. Rivett, as landlord, applied to the Court on 26th March 1943, for an order for possession from Bellak Brothers & Simmons Ltd. The application was heard by His Honour Judge Shea and was dismissed. Just when and how Bellak

Brothers & Simmons Ltd. was alleged to have become the tenant does not appear.

By Order in Council P.C. 3242 ([1943] 2 C.W.O.R. 226), passed on 22nd April 1943, under the authority of The War Measures Act and The Department of Munitions and Supply Act, the Minister of Munitions and Supply was given extraordinary powers in connection with the termination of leases and the suspension or variation of the terms of any lease or law affecting the occupation of any real property. Under date 19th May 1944 the Minister of Munitions and Supply made an order "that Bellak Brothers Limited presently occupying the premises known as 1199 Bathurst Street, in the City of Toronto, Province of Ontario, shall be allowed to retain possession of the said premises until November 30th, 1944, or for such further period as I may by Order fix, upon the same terms and conditions as those set forth in the presently existing lease with respect to the said premises and I do hereby require Mrs. P. E. Rivett, the lessor of the said premises, to let and give possession of the said premises to the said Bellak Brothers Limited for the period from June 1st, 1944 until November 30th, 1944 or for such further period as I may by Order fix, upon the same terms and conditions as those set forth in the presently existing lease."

It would appear that on some date prior to 6th November 1944, and subsequent to 19th May 1944, the appellant became the owner of the premises, and by a letter dated 6th November 1944, his solicitor advised Messrs. Rudolph and Wilhelm Bellak that they would be required to deliver possession to the appellant on 30th November, subject to such further order as the Minister of Munitions and Supply might decide to make.

The next document is a letter dated 9th November 1944, from the appellant's solicitor to Rudolph and Wilhelm Bellak stating "Your tenancy expires pursuant to the order of the Department of Munitions and Supply, on November 30, 1944. I have today on behalf of Mr. Gasner agreed with the Department to accept you as a monthly tenant pending consideration of this matter by us and the Department."

Next, by a letter dated 26th December 1944, the solicitor for the appellant notified the respondent company that it would be required to deliver up possession of the premises in question at or before the end of January 1945. By a letter bearing the same date one Crawford Gordon, Assistant Coördinator of

Production in the Department of Munitions and Supply, advised the solicitor for the appellant that it was not the intention of that Department to ask that the respondent "should be further protected by being allowed to remain in their present premises."

The respondent did not vacate, and these proceedings followed.

This appeal was argued as though the respondent company had been the tenant from the beginning. Reference to those earlier proceedings would leave one in doubt as to who actually was the tenant from time to time. In the notice of appointment served on the respondent the appellant sets out the ground upon which he relies as entitling him to possession. He starts out by alleging that the premises were originally rented to the respondent in 1939 for a term of one year, with an option to renew for a further term of two years, which option he alleges was exercised. Then he traces the occupancy, allegedly by the respondent, to date, and alleges that the respondent is a monthly tenant whose right to possession has been determined by the notice to quit dated 26th December 1944.

On the hearing before Judge Lovering counsel for the landlord did not come prepared to prove by *viva voce* evidence that a notice of intention to exercise the option, either written or verbal, had been given. He argued, as appeared from the record, that the fact that the tenant had continued in possession after 31st May 1940, together with the record of subsequent occurrences, proved that it had been exercised. When it was suggested that these facts did not amount to such proof, he requested an adjournment so that he might call Rivett as a witness. That request was neither granted nor denied. Instead the learned judge stated that even if the option had been exercised, the term certain which would be thereby created would have expired on 31st May 1942, and the fact that the tenant continued in possession after that date without any new arrangement with the landlord would result in a tenancy from year to year being created by operation of law. He finally held that the respondent was in possession as a tenant from year to year, and that no adequate notice to quit had been served terminating the tenancy. It would have been well if counsel for the landlord had pressed his request. Instead he seems to have been talked out of it.

I think that it must be concluded on the record as it stands, without any such *viva voce* evidence, that the option had been in fact exercised. Counsel for the tenant did not call any evidence, and made no effort to explain circumstances which, in my opinion, can lead only to the conclusion that the option was exercised. First, there was the notice to quit "when your lease expires on the 31st day of May next" contained in the letter of 24th February 1942. Mr. Rosenberg's reply, dated 3rd March 1942, sparkles with significance; "Messrs. Bellak wish to continue in possession of the property at the expiration of the lease" and "they desire to renew the lease on the same terms, for a further period of three years from the expiration thereof." That language, to my mind, permits of one interpretation only, namely, that it is an admission that the term of the lease was about to expire, just as the landlord in his notice had stated, and that the tenant wanted to remain in possession after the expiration of it, and to renew the lease for a further term of three years. The term would expire on 31st May 1942, only if the option had been exercised. Had it not been exercised, Mr. Rosenberg, instead of using the language which he did, would have replied that his client was entitled as of right to continue in possession because there was a tenancy from year to year.

In *Brewer v. Conger* (1900), 27 O.A.R. 10, a covenant in the lease required the lessor to grant another lease for a further period "provided the said lessee . . . should desire to take a further lease of said premises." There was, as here, no stipulation for notice or demand by the lessee nor any limit of time within which request or demand or notice was to be made or given. At p. 13, MacLennan J.A. says, "Upon such a covenant as that I think all that is essential is the existence of the desire. No doubt the lessor had a right to know, within a reasonable time, whether there was a desire or not. That could be ascertained by enquiry, if it was thought to be uncertain, or it might be plainly indicated by conduct and circumstances." At p. 14 he says, "There are many reported cases in which it was held that the tenant had lost the right of renewal, provided for in his lease, by not making request or demand therefor within a time expressly limited, or by neglect to perform some condition upon which his right depended. But this is not a case of that kind. There is no time limit, and no condition. The proviso that the tenant should *desire* a renewal, is no more than would be implied

even if not expressed. It meant no more than that the renewal was to be at his option."

In *Guardian Realty Company of Canada v. John Stark & Company* (1922), 64 S.C.R. 207, 70 D.L.R. 333, Duff J. (as he then was) at p. 215, says "His [the tenant's] right to call for a lease is qualified by the condition that if he gives up possession at the end of the term he loses it because thereby he exercised his option. If he remains in possession the landlord can force him to exercise his election by setting up his right to a lease in response to the landlord's demand for possession."

Here, while there is no evidence that the landlord demanded that the tenant either exercise the option or vacate, in my opinion it is obvious from the letters of 24th February and 3rd March that both parties were founding the right of the tenant to continue in possession after 31st May 1940 on a renewal pursuant to the option and on nothing else.

Mr. Rosenberg's letter constituted a notice of renewal within s. 16(1) of Order No. 74, and resulted in the lease being renewed for a further term certain of one year, expiring on 31st May 1943, by virtue of s. 17(1) (b) of the said Order.

Next we have the notice dated 17th February 1943, requiring the tenant to vacate on 31st May 1943; followed again by the notice of renewal dated 22nd February 1943. That notice to vacate and that notice of renewal were given pursuant to Order No. 108, which had revoked Order No. 74 and re-enacted certain provisions of Order No. 74.

Without quoting *verbatim* the relevant sections of Order No. 108, it will suffice to say that the notice to vacate was pursuant to s. 16, and the notice of renewal pursuant to s. 18. The result is that, by virtue of s. 21, the lease was renewed for a further term certain expiring on 31st May 1944.

Prior to the expiration of that further term the Minister of Munitions and Supply made his order which I earlier quoted, the effect of which was that the lease was extended for a further term certain expiring on 30th November 1944. Then, by the letter dated 6th November 1944, from the landlord's solicitor, the tenant was notified that it was required to vacate on 30th November, subject to any further order the Minister of Munitions and Supply might make. That was followed three days later by the letter of 9th November already referred to, and the notice to vacate dated 26th December. After the notice to

vacate was served Order No. 470 of the Wartime Prices and Trade Board ([1945] 1 C.W.O.R. 43) was passed on 29th December, and came into force on 2nd January 1945. Section 12 provides that—

“Except as provided in Sections 13 and 14, no tenant of any commercial accommodation shall be dispossessed of such accommodation or be evicted therefrom and no landlord shall demand that any tenant vacate or deliver up possession of any commercial accommodation.”

Section 13 provides that the landlord may recover possession of the accommodation in accordance with the law of the Province in which it is situated in the event that any one or more of the circumstances set out in the clauses of s. 13 obtain. The only one of those circumstances which it is necessary here to consider is that set out in clause (j), namely, the circumstance that the tenant “is in possession under a lease that is not for a term certain and has been given before January 2, 1945 a notice to vacate in accordance with the law of such Province”.

At this stage the question to be determined is what was the nature of the tenancy subsequent to 30th November 1944, and has it been effectually terminated by the notice to vacate dated 26th December?

The law undoubtedly is that if a tenant for a term of years holds over after the expiration of his term and pays rent which is accepted, then, if no other tenancy appears to have been agreed upon, the presumption is that the tenancy so created is from year to year upon such of the terms of the former holding as are not inconsistent with the holding from year to year. The mere holding over does not create the new tenancy. Mere holding over without the payment of rent or any new agreement results in a tenancy at sufferance. It is the payment and acceptance of rent which creates the new relationship and, unless some other new relationship appears to have been agreed upon, the presumption arises that a tenancy from year to year has been created. Whether a new relationship has been created by agreement is a matter of evidence and the presumption may be rebutted. Reference: *Young v. Bank of Nova Scotia* (1915), 34 O.L.R. 176, 23 D.L.R. 854. The basis upon which the law implies that the new tenancy has been created was expressed by Lord Mansfield C.J. in *Right d. Flower v. Darby and Bris-*

tow (1786), 1 Term Rep. 159 at 162, 99 E.R. 1029, in the following language:

"If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year."

In the case at bar, how could it be implied that there was a tacit renovation of the contract, in the face of the letter from the appellant's solicitor dated 9th November 1944? That letter made it perfectly plain that while the landlord was willing to permit the tenant to continue in possession after 30th November, it would not be on the basis of a tenancy from year to year, but only as a monthly tenant. I am not suggesting that the Department of Munitions and Supply was the agent for the tenant, and that the landlord could make any agreement with that Department which would be binding on the tenant. If a monthly tenancy was created, it was not the result of any agreement as alleged in the letter. The letter is important for another reason entirely, namely, that it rebuts the presumption that there was a tacit renovation of the contract, and that a tenancy from year to year should be implied.

There is further evidence rebutting that presumption. The company was anxious that the period during which it was protected by the order of the Minister of Munitions and Supply should be extended by him, or a new order made to the like effect, and, in an effort to have that accomplished, was in frequent communication with officials whose authority stemmed from the Minister of that Department. Included among these was one Gordon Lee, who was in the office of the Coördinator of Production, an official responsible to the Minister. Mr. Lee stated in evidence that he told Messrs. Bellak that the best he had been able to do for them was to arrange with the landlord that they might remain on as monthly tenants after 30th November. Their reply was that "that would be fine." That discussion preceded the solicitor's letter.

The tenant was free to vacate on 30th November. Nothing that Lee did obligated it to remain in possession. The point is that if the tenant remained in possession, it was with the knowledge that it could do so only as a monthly tenant. The solicitor's letter unequivocally so stated. No doubt the tenant was not happy about it, but it had no alternative except

to vacate. Having elected to remain, it did so as a monthly tenant.

The notice to vacate dated 26th December was a month's notice and effectual to terminate the tenancy on 31st January.

For these reasons I think the appellant is entitled to succeed. The appeal should, therefore, be allowed. The appellant should have his costs of this appeal and of the proceedings in the Court below.

Appeal allowed with costs throughout,
HENDERSON J.A. *dissenting.*

Solicitor for the landlord, appellant: Edward Laxton, Toronto.

Solicitor for the tenant, respondent: H. S. Rosenberg, Toronto.

[COURT OF APPEAL.]

**Donald et al. v. The Board of Education for the City of
Hamilton et al.**

Schools—Discipline—Rights of Boards and Teachers—Patriotic Exercises—Requiring Salute to Flag and Singing of National Anthem—Conscientious Objections—The Public Schools Act, R.S.O. 1937, c. 357, ss. 2, 5, 7(1), 89, 103(a), (i)—The High Schools Act, R.S.O. 1937, c. 360, s. 1—Regulations under The Department of Education Act, R.S.O. 1937, c. 356, s. 4(a), respecting Public and High Schools.

Under the relevant statutes and regulations, pupils in public or high schools who (or whose parents or guardians) object on religious grounds to saluting the flag or singing the national anthem are entitled to refrain from participation in these exercises without forfeiting their right to attend school. Since the Act and the regulations clearly recognize a right to refrain from taking part in "religious exercises", without defining that term, or specifying what is included in it or excluded from it, the Court cannot take to itself the right to say that it does not include the saluting of the flag or the singing of the national anthem, or that such exercises have no religious or devotional significance; to do so might well be to deny that religious freedom which the statutes and regulations are intended to protect. *West Virginia State Board of Education et al. v. Barnette, et al.* (1943), 319 U.S. 624 at 632; *The People of the State of New York v. Sandstrom, et al.* (1939), 279 N.Y. 523 at 535, quoted and applied. Judgment of Hope J., [1944] O.R. 475, reversed.

AN APPEAL by the plaintiffs from the judgment of Hope J., [1944] O.R. 475, [1944] 4 D.L.R. 227, dismissing the action. The facts are stated in the reasons for judgment.

15th and 16th March and 11th April 1945. The appeal was heard by HENDERSON, GILLANDERS and ROACH JJ.A.

W. Glen How, for the plaintiffs, appellants: Neither the respondent Board nor any school teacher employed by it has either the authority or the responsibility in law forcibly to require the infant appellants to sing or to participate in the singing of the three verses of the hymn or prayer constituting the national anthem, or to participate in the saluting of the flag. Participation in these two exercises is contrary to the religious beliefs of the appellants, and by virtue of The Public Schools Act, R.S.O. 1937, c. 357, s. 7(1) and The High Schools Act, R.S.O. 1937, c. 360, s. 8(1) and Reg. 12(1)(a) of the Regulations respecting High Schools and Collegiate Institutes, they are justified in their refusal to participate. The Public Schools Act gives a definite statutory right to a parent to have his child attend school. There is no right vested in the respondent Board permitting it to draw up rules and stipulate that non-compliance with them means exclusion from the schools. [HENDERSON J.A.: You say that the Board exceeded its powers under the statute, but why would you consider those exercises religious?] [ROACH J.A.: Do you say that if these acts are sincerely believed by the appellants to be religious acts, they should be so regarded by the Court?] Yes, the appellants believe that the Bible is the word of God and they must be obedient to it, and they consider the flag is an emblem of the state. [HENDERSON J.A.: I have assumed that this action was founded upon the appellants' right with respect to certain religious practices. Are the beliefs of the appellants purely individual or do they subscribe to a system of religion like other sects?] These appellants belong to a religious sect known as "Jehovah's Witnesses". If a child has a conscientious objection to any such exercises as the one in question, the respondent Board could not force the child to participate under the penalty of ejection. [GILLANDERS J.A.: The statute does not say that the parent or child can determine in his own mind what constitutes a religious exercise; it is a matter of fact.] These are state-maintained schools set up for educating the children of the Province. These beliefs are religious, and consequently, we are within s. 7 of The Public Schools Act. Within the understanding of the appellants these are religious exercises, and within the minds of other reasonable men there is a religious connotation to those exercises. [HENDERSON J.A.: Why couldn't anyone salute the flag without offending his conscience? Your argu-

ment is that believers in this religion do not think they owe honour or respect to anyone but God.] The respondent says that the appellants are not sincere in their beliefs and that the designation of the school regulations precludes the claim that the ceremonies here objected to can be religious. This proposition has been fully discussed in the case of *Adelaide Company of Jehovah's Witnesses Incorporated v. The Commonwealth* (1943), 67 C.L.R. 116. [HENDERSON J.A.: I do not understand how you connect this exercise with religion, or how the ordinary respect you are asked to pay to a person who occupies a position of honour can have religious significance.] The appellants consider the flag an "image" within the meaning of Exodus, XX, 4-5, and as for the singing of the national anthem, there is a prayer voiced therein which is incompatible with the belief and hope which they hold in the early coming of the new world. Many people other than Jehovah's Witnesses are prepared to admit that the blind adulation of the symbol of the state is a form of idolatry; *Minersville School District et al. v. Gobitis et al.* (1939), 108 Fed. (2d) 683, reversed 310 U.S. 586. According to the beliefs of the appellants, their entire service is due to God. [ROACH J.A.: Why cannot a Jehovah's Witness honour his parent and similarly pay respect to the flag? Surely neither act would be considered one of adoration. You are confusing honour and adoration.] [HENDERSON J.A.: Surely it is nothing more than a gesture of respect which in no way interferes with their other right of religious freedom.] Symbolism or a salute or any other form of respect in question is in the mind of the person giving it. In the case of a super-patriot, it might be a form of worship. It is important to know the intent in the mind of those setting up the regulations. As far as the appellants are concerned, their understanding of the prescribed acts is that they have a definite religious aspect. In their minds it is not purely a gesture of respect. If it is purely a matter of greeting, it is all the more unreasonable to insist that unless there be compliance, the children would be ejected from the school. It would mean in this case that because the appellants are being sincere and honest, they are being penalized for their beliefs. The infant appellant testified that if he saluted the flag he was attributing salvation to the state. [GILLANDERS J.A.: I fail to follow how by saluting the flag he can ascribe salvation to the state. If the flag were set up as a deity it would

be quite different.] The appellants feel they are being asked to worship. [HENDERSON J.A.: Your argument is clear that what may be a mere act of politeness on the part of one man, may be a religious exercise on the part of another.] When it can be shown that there is a definite religious objection, that is not entirely the belief of the individual, it is no longer a matter of caprice. [ROACH J.A.: If the state said to your clients: "In saluting the flag, all we ask of you is to pay a measure of respect", would your clients still refuse?] Yes, they would say it is not for the state to decide as regards their consciences. The singing of the anthem and the salute to the flag are devotions to religion.

This is an infringement of personal liberty, which should be guarded by the state: *Rossi v. Lord Provost, &c, Edinburgh et al.*, [1905] A.C. 21. There is a statutory guarantee that no child shall have his religious freedom jeopardized. In addition, there is the common law responsibility and right of the parent to teach his child and to provide such spiritual instruction as is in his belief most apt to work to the welfare of the infant: *In re Scanlan* (1888), 57 L.J. Ch. 718. The regulations as sought to be enforced are inconsistent with the Act in that for the sake of certain possible, but not proved, advantages, an attempt is made to deny all other rights and privileges under the said statute. This would inevitably lead to the citizen suffering from abuses by officials: *Bell v. Graham; Marshall v. Graham* (1907), 76 L.J.K.B. 690. In *Hardwick v. Board of School Trustees of Fruitridge School Dist.* (1921), 205 Pac. 49, the California Court of Appeals was obliged to consider the validity of an attempt by a school board to introduce dancing in their school in the face of religious objections to it. When the ceremony is enforced against conscientious objectors it is more likely to defeat than to accomplish high purposes. The attempt to make this patriotic ceremony one of compulsion, on threat of expulsion, is beyond the powers of the school board.

[GILLANDERS J.A.: It is necessary to remember, regarding American cases, that the Constitution guarantees certain rights to American citizens which may govern the facts in each case.]

The principles of British law require a construction consonant with the maintenance of freedom of worship in its broadest form, regardless of the unusual or dissentient quality of the belief. The infant appellants demonstrate true loyalty and love

of country and the flag by standing firmly for the principles of liberty for which it stands.

O. M. Walsh, K.C., for the defendants, respondents: Our case is based upon the statutes of Ontario and the regulations enacted thereunder. If this Court concludes that it is a patriotic gesture to sing the national anthem and salute the flag, then the Legislature has provided that these acts shall be done. The Public Schools Act, R.S.O. 1937, c. 357, s. 103(a) invests the principal with power to prescribe ways of encouraging loyalty to country. [HENDERSON J.A.: The case of *West Virginia State Board of Education et al. v. Barnette et al.* (1943), 319 U.S. 624 impresses me very much. These American cases are founded upon the written Constitution of the United States, specifically the 1st and 14th amendments thereto. In those enactments, freedom of religious thought is guaranteed to American citizens in the United States. Is not a British subject guaranteed at least as much freedom of thought as an American citizen in similar circumstances? How can you say the legislature may interfere?] We must confine the question to our laws. American cases are based on constitutional questions. Here the sole question to be determined is whether or not the singing of the national anthem and the saluting of the flag are patriotic or religious exercises. Both are patriotic exercises, and it is imperative for the respondent and its teachers to see that such patriotic exercises are carried out. The appellants' contention is that if they are convinced that their consciences will be injured by a state law, then the state law must get out of the way. A chaotic condition would arise if individuals were allowed to assert their superiority to a state law. By statutory provision the legislature has determined that the singing of the national anthem is not a religious exercise and, therefore, it follows that it was the imperative duty of the respondent and its teachers to see that each pupil actively participated in the exercise. The two American cases cited by the appellants at the trial, namely *Minersville School District et al. v. Gobitis et al.* (1940), 310 U.S. 586, and the *Barnette* case, *supra*, were decisions based on the power of the respective school boards to make the salute a legal duty on a constitutional basis and, therefore, are not applicable to the issues on review in this appeal. The appellants recognize the authority of the state only when it does not conflict with their religious convictions. [ROACH

J.A.: Counsel for the appellants says that these are religious acts; he relies upon the statute.] If this Court finds that saluting the flag and the singing of the national anthem are patriotic acts, then s. 7 of The Public Schools Act is not applicable. [HENDERSON J.A.: Your proposition is that by virtue of the words of s. 7 we must decide whether saluting the flag and singing the national anthem are religious acts?] It is for the Court to apply the facts to the law: 10 C.E.D. (Ont.), p. 213. The law to be decided is whether these are patriotic exercises within the meaning of the Act. [HENDERSON J.A.: My understanding of the appellants' position is that if they are called upon to do something which conflicts with their religious conscience, then they will not do it. With what law does it conflict if they refuse to salute the flag?] We cannot allow 245 sects to state what conflicts with their religious beliefs in matters of this kind, particularly where school discipline is involved. [GILLANDERS J.A.: The statute must be used as the test.] We must go to the law for the test. [ROACH J.A.: I can conceive of a case where someone would have a whim that could not be indulged, but when you have a group who are not being whimsical, that is a different matter.] Where there is any conflict between a state law and conviction, even though the conflict be on religious grounds, then the state law must prevail, otherwise, chaos would follow. The trial judge found that the duties of the teachers were imperative by statutory legislation and had to be carried out. Our duty is to carry out the Act. Where do we stand regarding other parents and their children? The singing of the national anthem is not a religious exercise, it is a patriotic one. The law of the state is the test. If the exercises are not compulsory, and the teachers have no right to insist upon the pupils' participation, then the appeal succeeds. If the exercises are compulsory, then the appeal is lost. It is our position that the regulations call for such exercises and the teacher merely enforces the regulations. In *Ruman v. Board of Trustees of Lethbridge School District*, [1943] 3 W.W.R. 340, [1944] 1 D.L.R. 360, it was held that the provisions of the Alberta statute were not imperative, but merely discretionary, and the legislation under consideration in that case provided that the singing of the national anthem and the saluting of the flag were part of the patriotic exercises. This would indicate quite clearly, that a salute to the flag is not in its nature a

religious exercise. If this appeal succeeds, all kinds of ridiculous situations are likely to arise. [GILLANDERS J.A.: The Act does not go as far as that; the only privilege is not to join in any religious exercise.] [HENDERSON J.A.: It is fundamental that you have freedom of conscience according to individual conscience.] It is necessary to consider the welfare not only of the appellants, but of the whole school: *Fitzgerald v. Northcote et al.* (1865), 4 F. & F. 656, 176 E.R. 734, and if these children influence the others in a detrimental fashion they should be expelled: *Hutt et al. v. The Governors of Haileybury College et al.* (1888), 4 T.L.R. 623 at 624; [HENDERSON J.A.: The answer to that problem is the abolition of religious exercises.] Yes, but patriotic exercises should be retained.

W. Glen How, in reply: There is no law which demands that these children should participate in these exercises. They have fundamental rights which should have no interference. Reference is made to the following cases: *Jones v. Opelika* (1943), 319 U.S. 103; *Borchert et al. v. City of Ranger et al.* (1941), 42 Fed. Supp. 577; *Lynch et al. v. City of Muskogee* (1942), 47 Fed. Supp. 589.

Cur. adv. vult.

6th June 1945. HENDERSON J.A.:—I concur in the reasons and conclusion of my brother Gillanders, and have nothing to add.

GILLANDERS J.A.:—The plaintiffs appeal from a judgment of Mr. Justice Hope dismissing with costs their action against the respondent Board of Education seeking a declaration, a *mandamus* and damages under the following circumstances:

The appellant Robert Donald is the father of the two infant appellants, who were at the time of the trial sixteen and twelve years of age respectively. They reside in the city of Hamilton. On 18th September 1940, the two infant appellants, who prior thereto had attended a public school in the city of Hamilton under the jurisdiction of the respondent Board, were sent home with a letter from the school principal addressed to their father and reading as follows:

“Your children Robert, Grade VIII and Graham, Grade IV, have refused to take part in the opening exercises of this school. They refuse on religious principles to sing ‘God Save the King’, to repeat the pledge of allegiance, and to salute the Flag.

"Your children are hereby suspended from this school and a copy of this letter sent to the Board of Education."

Later, in 1942, after having taken private tuition and having passed his high school entrance, the older boy was expelled from a secondary school, also under the jurisdiction of the respondent Board, for "not joining in the singing of the National Anthem or saluting the flag at the morning exercises." The expulsion, in both instances, was approved or authorized by the respondent Board, and the Board accepts full responsibility for the action taken.

The appellants, father and sons, are affiliated with "Jehovah's Witnesses" and believe that saluting the flag and joining in the singing of the national anthem are both contrary to and forbidden by command of Scripture—the former because they consider the flag an "image" within the literal meaning of Exodus, chapter XX, verses 4 and 5, and the latter because, while they respect the King and the State, the prayer voiced in this anthem is not compatible with the belief and hope which they hold in the early coming of the new world, in the government of which present temporal states can have no part.

On the interpretation placed by the learned trial judge on the relevant statutes and regulations, he held the opinion not only that power is vested in principals and teachers to require pupils to join in the salute to the flag and in the singing of the national anthem, but that there is an imperative duty on them to exercise such powers.

It lies at the threshold of the problem raised to consider whether or not the Legislature has, by statutory provisions, required or empowered school boards or teachers of pupils in public or secondary schools to require pupils to perform or join in either or both of the exercises in question.

The Public Schools Act, R.S.O. 1937, c. 357, by s. 5 provides that schools constituted under the Act are to be free and, subject to the irrelevant limitations there mentioned, that every person between five and twenty-one years of age "shall have the right to attend some such school in the urban municipality . . . in which he resides." Section 7(1) is of some importance here and provides:

"No pupil in a public school shall be required to read or study in or from any religious book, or to join in any exercise of devotion or religion, objected to by his parent or guardian."

By s. 89, "It shall be the duty of the boards of all public schools to see that the same are conducted according to this Act and the regulations"

By s. 103, "It shall be the duty of every teacher,—

"(a) to teach diligently and faithfully the subjects in the public school course of study as prescribed by the regulations, to maintain proper order and discipline in the school, to encourage the pupils in the pursuit of learning, and to inculcate by precept and example respect for religion and the principles of Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues;

"(i) to suspend any pupil guilty of persistent truancy, or persistent opposition to authority, habitual neglect of duty, the use of profane or improper language, or conduct injurious to the moral tone of the school"

Section 2 of the Act provides that the regulations, which are defined by s. 1(i) to mean regulations made under The Department of Education Act, R.S.O. 1937, c. 356, "shall apply to any matter or thing in this Act contained, so far as the same are consistent with this Act."

Various provisions of the 1943 regulations relating to the powers and duties of principals and teachers, the duties of pupils, and the conduct of the school may be noted. By reg. 7(2) it is the duty of the pupil, *inter alia*, to be "obedient and respectful to the teachers; and he shall submit to such discipline as would be exercised by a kind, firm, and judicious parent."

Reg. 9(1) provides: "In every Public and Separate School, the singing of the National Anthem as authorized by the Department shall form part of the daily opening or closing exercises."

Reg. 13(1) (a) is: "Every Public School shall be opened with the reading of the Scriptures and the repeating of the Lord's Prayer, and shall be closed with the Lord's Prayer or the prayer authorized by the Department; but no pupil shall be required to take part in any religious exercises objected to by his parent or guardian."

By reg. 13(1) (c), "If the parent or guardian objects to his child or ward taking part in the religious exercises, but directs that he shall remain in the schoolroom during these

religious exercises, the teacher shall permit him to do so, provided that he maintains decorous behaviour during the exercises."

It should be noted that the regulations provide for the singing of the national anthem as part of the daily opening or closing exercises, but no specific provision is made, in either the Act or the regulations, for the salute to the flag as part of the school exercises. The duty, wisely imposed on teachers by the Act itself, "to inculcate by precept and example respect for religion and the principles of Christian morality and the highest regard for truth, justice, loyalty, love of country", etc. is, of course, to be read with other provisions of the statute, and provisions of the regulations apply only "so far as the same are consistent with this Act" (s. 2).

The High Schools Act, R.S.O. 1937, c. 360, applicable to the secondary school attended for a time, prior to his expulsion, by the elder of the infant appellants, contains in itself no provision to the same effect as s. 7 of The Public Schools Act, but, by the regulations applicable, it is provided:

"12. (1)(a) Every High School shall be opened with the reading of the Scriptures and the repeating of the Lord's Prayer, and shall be closed with the Lord's Prayer or the prayers authorized by the Department of Education; but no pupil shall be required to take part in any religious exercises objected to by his parent or guardian.

"(b)(ii) To secure the observance of this regulation, the teacher, before commencing a religious exercise, shall allow the necessary interval to elapse, during which the children or wards of those, if any, who have signified their objection, may retire.

"(c) If the parent or guardian objects to his child or ward taking part in the religious exercises, but directs that he shall remain in the schoolroom during such exercises, the teacher shall permit him to do so, provided that he maintains decorous behaviour during the exercises.

"(d) If, in virtue of his right to be absent from the religious exercises, any pupil does not enter the schoolroom until the close of the time allowed for religious exercises, such absence shall not be treated as an offence against the rules of the school".

By reg. 11(3) it is provided: "In every High and Vocational School, the singing of the National Anthem as authorized by the

Department shall form part of the daily opening or closing exercises."

In the case of high schools the provision in the regulations for the singing of the national anthem, while not in conflict with any section of the statute itself, must be read with reg. 12. They are not necessarily in conflict. If the exercise is one of a religious nature to which the parent or guardian of a pupil objects, then his rights are amply protected by the provisions of reg. 12.

The appellants urged that to them both exercises in question, the flag salute and joining in the singing of the national anthem, are religious exercises to which they object by reason of their religious beliefs, and in which, by virtue of s. 7 of The Public Schools Act and by reg. 12 respecting high schools, they are not required to join. The respondents, on the other hand, say that these exercises are not, and cannot be said to be, exercises of devotion or religion, that the flag salute is merely a step in teaching by precept and example loyalty and love of country and cannot reasonably be said to connote any religious significance, and that, similarly, the singing of the national anthem falls in the same category; and, in any event, it is required by the regulations to form part of the opening or closing exercises of the school.

Perhaps those who framed the regulations so providing never considered that any well-disposed person would object to its inclusion in their programme on religious grounds. There is no doubt that the teachers and the school board, in the case now being considered, in good faith prescribed the ceremony of the flag salute only with the thought of inculcating respect for the flag and the Empire or Commonwealth of Nations which events of recent years have given more abundant reason than ever before to love and respect. If I were permitted to be guided by my personal views, I would find it difficult to understand how any well-disposed person could offer objection to joining in such a salute on religious or other grounds. To me, a command to join in the flag salute or the singing of the national anthem would be a command not to join in any enforced religious exercise, but, viewed in proper perspective, to join in an act of respect for a contrary principle, that is, to pay respect to a nation and country which stands for religious freedom, and

the principle that people may worship as they please, or not at all.

But, in considering whether or not such exercises may or should, in this case, be considered as having devotional or religious significance, it would be misleading to proceed on any personal views on what such exercises might include or exclude. Although various cases in the United States dealing with questions arising out of the flag salute are not binding here, and are not concerned with the legislation here being considered, I desire respectfully to adopt a portion of what was said by Mr. Justice Jackson in his interesting opinion in the case of *West Virginia State Board of Education et al. v. Barnette et al.* (1943), 319 U.S. 624, at 632:

"Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and robes, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect; a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."

And also the observations of Lehman J. in *The People of the State of New York v. Sandstrom et al.* (1939), 279 N.Y. 523 at 535: "There are many acts which are not acts of worship and which for most men have no religious significance and are entirely unrelated to the practice of any religious principle or tenet but which may involve a violation of an obligation which other men may think is imposed upon them by divine command or religious authority. To use a homely illustration, partaking of food is ordinarily in no sense 'any approach to a religious observance.' It is purely mundane, with no religious significance, and yet ordinances establishing fast days or prohibiting the use of certain kinds of food are a part of the religion of many people."

That certain acts, exercises and symbols at certain times, or to certain people, connote a significance or meaning which, at other times or to other people, is completely absent, is a fact so obvious from history, and from observation, that it needs no elaboration.

The fact that the appellants conscientiously believe the views which they assert is not here in question. A considerable number of cases in other jurisdictions, in which a similar attitude to the flag salute has been taken, indicates that at least the same view has been conscientiously held by others. The statute, while it absolves pupils from joining in exercises of devotion or religion to which they, or their parents, object, does not further define or specify what such exercises are or include or exclude. Had it done so, other considerations would apply. For the Court to take to itself the right to say that the exercises here in question had no religious or devotional significance might well be for the Court to deny that very religious freedom which the statute is intended to provide.

It is urged that the refusal of the infant appellants to join in the exercises in question is disturbing and constitutes conduct injurious to the moral tone of the school. It is not claimed that the appellants themselves engaged in any alleged religious ceremonies or observations, but only that they refrained from joining in the exercises in question. As stated by the learned trial judge, "it is clear that although the infant plaintiffs refused to so sing and so salute, they otherwise stood respectfully during such exercises and in no way, other than the refusal to participate, showed any disrespect or caused any outward disturbance by their conduct." The regulations relating to both public and high schools specifically contemplate that a pupil who objects to joining in religious exercise may be permitted to retire or to remain, provided he maintains decorous conduct during the exercises. To do just that could not, I think, be viewed as conduct injurious to the moral tone of the school or class.

I have been somewhat troubled on the question of damages. In this case the expulsion was not based on a matter to which reasonable cause, in the opinion of the Board or teacher, exercised in good faith, can provide an effective answer, as in *Wood v. Prestwich* (1911), 104 L.T. 388. The only reason for the expulsion was the failure to join in the exercises from which, in the opinion of this Court, the provisions of the Acts and

regulations excused the appellants. It was, therefore, illegal, and although it was accompanied by no *mala fides*, and no doubt exercised in good faith, it follows that the appellants are entitled to damages. There is evidence, apparently accepted by the learned trial judge, that the adult appellant expended \$378 for private tuition and books which would otherwise have been supplied by the respondents. The individual private tuition may well have involved, in some aspects, benefits which the Board's schools could not be expected to provide, and, on the other hand, no doubt lacked certain benefits to be obtained there. The learned trial judge finds that were he assessing damages "they would not exceed \$378, being the actual out-of-pocket expenses for tuition and the cost of school books which would otherwise have been supplied by the defendant." I see no reason to interfere with the view he expressed in this regard.

For the reasons indicated the appeal must be allowed, and the appellants should have a declaration that the infant appellants are entitled, subject to the provisions of the relevant statutes and regulations, to attend the proper schools of the respondent Board, and refrain from joining in the exercises in question in this action. The adult appellant should have judgment for \$378, and the appellants should have their costs here and below.

ROACH J.A. agrees with GILLANDERS J.A.

Appeal allowed with costs throughout.

Solicitor for the plaintiffs, appellants: W. Glen How, Toronto.

Solicitors for the defendants, respondents: Walsh & Evans, Hamilton.

[COURT OF APPEAL.]

Wilmot et al. v. The City of Kingston.

Municipal Corporations—Zoning By-laws—Lands already in Use for Purpose contrary to By-law—Effect of By-law as to such Lands—The Municipal Act, R.S.O. 1937, c. 266, s. 406, as re-enacted by 1941 (Ont.), c. 35, s. 13.

A municipal zoning by-law which provides that buildings which at the date of the passing of the by-law are used for a purpose prohibited by the by-law shall not thereafter be enlarged, reconstructed or altered structurally, unless they are thereafter to be used for a permitted purpose, is *ultra vires*, as being in direct conflict with s. 406(2) of The Municipal Act, as re-enacted in 1941. If, however, this provision is severable from the rest of the by-law, the whole by-law is not rendered invalid, but should be preserved with the deletion of the illegal provision. *In re Michie and The City of Toronto* (1862), 11 U.C.C.P. 379; *In re Taylor and Town of Port Stanley* (1918), 14 O.W.N. 108, referred to. Although it is good practice, it is not essential that the by-law should contain a proviso setting forth the exemption provided for in s. 406(2). *Re Toronto Roman Catholic Separate School Board and Price*, 54 O.L.R. 224; [1924] S.C.R. 368; [1926] A.C. 81, applied.

A dairy plant, to which milk is brought and where it is processed, pasteurized and bottled, and thereafter peddled to customers throughout the municipality, is not "a retail store or shop", although, as incidental to the business, customers may occasionally call at the dairy and there buy bottles of milk or cream. *City of Toronto v. Foss* (1912), 27 O.L.R. 264, 612; *Re Longley* (1928), 34 O.W.N. 181; *Rex v. Wells* (1911), 24 O.L.R. 77, applied.

AN appeal from an order of Mackay J. The facts are stated in the reasons for judgment.

14th May 1945. The appeal was heard by HENDERSON, ROACH and MCRUER JJ.A.

J. R. Cartwright, K.C. (C. M. Smith with him), for the plaintiffs, appellants: If s. 1 of this by-law is valid, it prevents the enlarging of our building, but we contend that it is *ultra vires* in that it does not embody the limitations provided for by s. 406(2) of The Municipal Act, R.S.O. 1937, c. 266, as repealed and re-enacted by s. 13 of The Municipal Amendment Act, 1941, c. 35. In the alternative, we are entitled to a permit on the ground that the appellants come within the permissible uses defined in s. 6 of the by-law, as their place of business is a retail store or shop. It will be the same business, with the premises made larger and more sanitary. [HENDERSON J.A.: You applied for a permit to extend an existing building and remodel the premises. You have been refused a permit to erect a new building on additional land.]

By-law 184, by disregarding subs. 2 of s. 406 of The Municipal Act is *ultra vires*. It cannot by virtue of subs. 2 be applicable to any land or building which "on the day of the passing of the by-law, is used or erected for any purpose prohibited by

the by-law, so long as it continues to be used for that purpose." Our lands and buildings on the day the by-law was passed were used for the purpose described. It must be clear that s. 9.3.1 of the by-law must be held not applicable to the building in question, or it is bad altogether. If the by-law does not preserve the limitations provided for by s. 406 of The Municipal Act, it becomes bad *in toto*. [HENDERSON J.A.: You say that s. 9.3.1 of by-law no. 184 exercises authority given it by subs. 1 of s. 406 of The Municipal Act and inasmuch as it does not expressly say that it is not applicable to the building or lands which on the day of passing of the by-law were used or erected for a purpose prohibited by the by-law, even though they continued to be used for that purpose, it contravenes subs. 2 of s. 406 of The Municipal Act?] Yes.

Our business comes within the permissible use of a retail store as defined in s. 6 of the by-law; *Re Domestic Storage & Forwarding Co. and Village of Forest Hill*, [1932] O.R. 350, [1932] 3 D.L.R. 175; *Re Longley* (1928), 34 O.W.N. 181. One must apply the tests of what is a store, as set out in the cases. We are principally concerned with the sale of milk. We sell at retail over the counter; all of our building is necessary just to sell milk. Reference is made to the case of *Re Secure Investments Ltd. and The Township of York*, [1933] O.W.N. 602 at 603-604, in which there arose the question whether a dairy was a factory or a store.

T. J. Rigney, K.C., for defendant, respondent: The city engineer has based his ruling principally upon the fact that the building to be torn down will not be rebuilt according to the provisions of the by-law. The old building was erected according to the by-law and to statute. The right given by statute concerning an old building does not extend to a new building. There must be a distinction made between the existing building and a new building on land that has just been acquired. It is our position that the appellants planned to use the land for purposes which were not permissible. The building would be of a different character than the one in existence upon the date the by-law was passed. The language employed in the by-law does not violate the language of subs. 2 of s. 406 of The Municipal Act, as amended. The old building was erected in accordance with the provisions of the by-law and the statute. The rights given by the statute concern the old building and do not extend to the new building.

J. R. Cartwright, K.C., in reply: Selling to the retail trade means selling at retail to people in the store. If a business consisted principally of a retail store and there was occasionally a wholesale sale of milk, it would still come within the protection of the by-law. [HENDERSON J.A.: Does subs. 2 enable you to replace an old building with a new building, even if it is put to the same use?] Yes, at the time this by-law was passed, this land was being used for supporting a building which was to be used for dairy purposes. We are entitled to a beneficial construction of the statute when it seeks to limit our common law rights; the section must be strictly construed. Is the test the physical condition of the building on the date of the passing of the by-law, or is it the other test of the use of the building on that date? If the test is the latter, and you have the prohibited use on that date, you may continue that use.

Cur. adv. vult.

7th June, 1945. The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal from an order of Mackay J. dated the 19th day of February 1945, dismissing an application of the appellants for an order of *mandamus* requiring the defendant corporation to issue to them a building permit in respect of certain proposed construction on the appellants' premises on Frontenac Street in the city of Kingston.

The appellants carry on a dairy business in the city of Kingston under the firm name of Crown Dairy. This business has been carried on for over ten years at premises described as consisting of part of lots 580 and 581 on the westerly side of Frontenac Street. The dairy plant presently consists of a dairy building in which the milk is processed and the office is located, a horse stable, which is a detached building, and a garage, which is also a detached building.

In September 1941 the appellants entered into an agreement to purchase from one Casselman an additional portion of lot 581, contiguous to their other lands, and obtained the deed of these additional lands in June 1944. These lands will be hereafter referred to as the Casselman lands. It is said that this additional land was purchased on account of the expanding needs of the business. The appellants, being desirous of remodelling and enlarging their plant, applied to the defendant corporation, in

November 1944, for a building permit covering the proposed construction. This construction included a proposed building to be erected on the Casselman lands and the razing and reconstruction of a building on the original lands. The application was refused on the ground that the proposed constructions contravened the provisions of a zoning by-law, no. 184, and its amendments.

By-law no. 184, was passed on 15th December 1941, and is entitled "A By-law for the Zoning of the City of Kingston." It has been amended from time to time, and all amendments have been duly approved by the Ontario Municipal Board. This by-law was passed under the authority of s. 406 of The Municipal Act, R.S.O. 1937, c. 266, as repealed and re-enacted by s. 13 of The Municipal Amendment Act 1941, c. 35.

The relevant portions of s. 406 are as follows:

"(1) By-laws may be passed by the councils of local municipalities:

"Restricted Areas.

"1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law, within any defined area or areas or abutting on any defined highway or part of a highway.

"2. For prohibiting the erection or use of buildings, for or except for such purposes as may be set out in the by-law, within any defined area or areas or upon land abutting on any defined highway or part of a highway.

"(2) No by-law passed under this section shall apply to any land or building which, on the day of the passing of the by-law, is used or erected for any purpose prohibited by the by-law, so long as it continues to be used for that purpose. . . ."

The balance of this section has no application to the case at bar.

The relevant sections of By-law no. 184 are as follows:

"1.1. Within the City of Kingston, no dwelling, business, trade or industry shall be located, nor shall any building or structure be erected, altered, or used, nor shall any land be used, except in conformity with the regulations of this by-law."

1.2. This section divides the municipality into "use zones".

1.3. This section classifies the "use zones", and for the purpose of reference three of these classifications are referred to as residential zones and two as commercial and industrial zones.

The zone in which the appellants' lands are located is one of three types of residential zone as classified by s. 1.3. and is described as "Zone C".

6.2. This section defines the permissible uses of any building or part thereof and any land in Zone "C", and without quoting the whole section it will suffice to say that in Zone "C", "No building or part thereof and no land shall be used for purposes other than" residential purposes and "a retail store or shop".

"9.3.1. Existing Structures.

"Subject to Item 9.3.2. a building, which at the date of enactment of this By-law, is used for a purpose not permissible within the district in which it is located, shall not be enlarged, extended, reconstructed, or altered structurally, unless such building is thereafter to be used for a purpose permitted within such district, provided that the interior of such building may be reconstructed or altered, in order to render the same more convenient or commodious for the same purpose for which, at the date of enactment of this By-law, such building is used."

"9.3.2. Partial Destruction of Existing Buildings.

"A building which is damaged to the extent of fifty per cent or more of its value (exclusive of walls below grade) as at the date of the damage and as determined by fair building standards, and which does not conform with the requirements of this By-law in respect of use, lot occupancy or height, shall not be restored except in conformity with the regulations for the use zone in which such building is located."

"9.3.3. Extension of Non-Conforming Uses.

"Any use made of buildings or lands at the date of enactment of this By-law may be continued, although not conforming with the regulations of the use zone in which they are located, or such use may be extended throughout the building, provided, in either case, that no structural alterations, other than those provided in Item 9.3.1., or as may be required by existing law or by-law, are made therein, and that no new building or extension to such building is erected.

Counsel for the appellants argued, first, that the by-law was *ultra vires* because it purports to apply to land or buildings which, on the day of the passing of the by-law, were used or erected for a purpose prohibited by the by-law, even though they continued to be used for that purpose, and, therefore, that it contravenes subs. 2 of s. 406 of The Municipal Act.

The municipality, being the creature of the Legislature, can exercise only those powers which the Legislature confers upon it. Focusing attention on ss. 9.3.1, 9.3.2 and 9.3.3 of by-law 184, what does the respondent corporation purport to do in the exercise of the power conferred upon it by the Legislature? I think it is plain that it purports to do exactly what the Legislature by subs. 2 of s. 406 has said it shall not do, *viz.*, to make the by-law apply to land and buildings which at the date of the passing of the by-law were used for a purpose prohibited by the by-law, even though those lands and buildings continue thereafter to be used for that purpose. Those sections demonstrate this excess of jurisdiction very plainly. By them the corporation purports to exercise a restrictive authority over land and/or buildings, the use of which, as of the date of the passing of the by-law, was not in conformity with the restrictions in the by-law, even though the use thereafter continues to be the same as before.

The use to which the appellants' original lands and buildings—this does not include the Casselman land—were put as of the passing of the by-law has continued to be the same from the passing of the by-law to date, and the use to which the remodelled or additional structures on the original lands will be put hereafter is this same use, *viz.*, for the operation of a dairy business. For these reasons by-law no. 184, despite ss. 9.3.1 and 9.3.3, has no application to these lands and buildings, and if, as I understood during the argument was the case, the appellants desire to modernize those buildings by altering or adding to them or razing or reconstructing some or all of them, by-law no. 184 does not stand in the way.

Sections 9.3.1, 9.3.2 and 9.3.3 are *ultra vires*, but that does not make the whole by-law invalid. Those sections are severable from the rest of the by-law. When a by-law is illegal in part only, and the illegal part can be separated from the part which is legal, the Court will separate the good from the bad, and preserve the by-law with the illegal portions deleted: see *In re Michie and The City of Toronto* (1862), 11 U.C.C.P. 379 at 386, and *Re Taylor and Town of Port Stanley* (1918), 14 O.W.N. 108.

When ss. 9.3.1, 9.3.2 and 9.3.3 are expunged from the by-law, then, so far as the regulations governing Zone "C" are concerned, there remain the general restrictions imposed by ss. 6.1 and 6.2. The by-law does not contain any provision providing for the ex-

emption mentioned in s. 406(2) of the statute. While it might be good practice to include in the by-law a proviso providing for such exemption, it is not necessary to do so: see *Re Toronto Roman Catholic Separate School Board and Price* (1923), 54 O.L.R. 224 at 230. There it was argued that the by-law was bad because it did not provide for an exception mentioned in the statute similar in effect to s. 406(2), and this Court held against that contention. The judgment of this Court was reversed on an appeal to the Supreme Court of Canada, [1924] S.C.R. 368, [1924] 3 D.L.R. 113, but not on that point, and on an appeal to the Privy Council, [1926] A.C. 81, [1925] 3 D.L.R. 880, that argument was abandoned.

By-law no. 184, however, does stand in the way of the appellants using the Casselman lands for any purpose other than residential purposes, or a retail store or shop. These lands, as of the date of the passing of the by-law, were not then used for dairy purposes and so long as by-law no. 184 stands cannot hereafter be used for dairy purposes, unless it can be said that the use of them for that purpose is using them for the purposes of a retail store or shop.

That brings me to the second argument advanced by counsel for the appellants. He argued that the appellants' business is that of a retail store and therefore does not come within the prohibitions applicable to areas in Zone "C". What is a store?

In *Re Longley* (1928), 34 O.W.N. 181, Middleton J.A., in deciding that a gasoline service station was a store, applied the test adopted in *City of Toronto v. Foss* (1912), 27 O.L.R. 264, 8 D.L.R. 641, affirmed 27 O.L.R. 612, 10 D.L.R. 627, *viz.*, is it a place where goods are kept for sale? In *Rex v. Wells* (1911), 24 O.L.R. 77, 18 C.C.C. 377, it was held that a restaurant keeper was not a merchant within the meaning of The Lord's Day Act, that his establishment was a place where work and labour predominated, and that the sale of goods was only incidental to the business.

Certainly I had never previously thought of a dairy, such as the appellants operate, as being a store, and on reflection I am prepared to say that it is not a store within the meaning of "a retail store or shop", as used in s. 6.2 of by-law no. 184. Milk is delivered to the appellants' plant, there it is processed, pasteurized and bottled through the use of multifarious types of

machinery and equipment designed for that particular purpose. Then it is loaded into delivery vehicles and peddled to customers throughout the city. Surely it cannot be said that this business comes within the definition of a retail shop or store in by-law no. 184. It may well be that incidental to the business customers occasionally call at the dairy and purchase bottles of milk or cream, but this does not make it a retail store or shop, and applying the language in *Rex v. Wells, supra*, it is a place where work and labour predominate. It would be absurd to say that a saw-mill to which farmers hauled logs which were purchased by the proprietor and there sawn and cut up into lumber of various types and sizes, was a store, even though the proprietor was in the business of selling by retail the lumber into which the logs were cut. I think it just as illogical to describe the appellants' business as a retail store or shop.

The appellants' application for a permit covered the proposed construction not only on the original lands but also on the Casselman lands and although, as I have held, by-law no. 184 does not apply to the original lands or buildings, it does apply to the Casselman lands, and because it does so apply the respondent corporation was justified in refusing a permit.

The order appealed from was correct and the appeal must therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the applicants, appellants: C. M. Smith, Kingston.

Solicitor for the respondent: T. J. Rigney, Kingston.

[COURT OF APPEAL.]

Eppler v. Szczepkowski.

Trusts—Mingling of Trust Funds with Trustee's Own—What Circumstances Sufficient to Establish.

Gifts—Donatio mortis causa—Essential Elements—Necessity for Showing Intention to Make Gift.

Evidence—Corroboration—Claim against Estate of Deceased Person—Sufficiency of Corroboration—The Evidence Act, R.S.O. 1937, c. 119, s. 11.

E, shortly before his death, gave to the defendant, his sister, a cheque for \$9,000, which represented practically his entire assets. The plaintiff who, although not married to E, had lived with him as his wife, and who was the executrix and sole beneficiary under his will, sued to recover the proceeds of this cheque, alleging that the bank account on which it had been drawn was not entirely the property of E, but consisted, at least in part, of the plaintiff's earnings, which she had pooled with E's. The defendant sought to uphold the transaction as a *donatio mortis causa*.

Held, the plaintiff was entitled to judgment. On the evidence, it appeared that the plaintiff and E had pooled their earnings, and the bank account was made up of moneys belonging to both of them. The circumstances, as disclosed in evidence, were entirely inconsistent with the suggestion that E had intended to make a gift to the defendant of practically his whole estate, and the transfer of the cheque was therefore not a valid *donatio mortis causa*. Nowhere in the evidence was there any corroboration of the defendant's story that the cheque had been intended as a gift, and the circumstances all indicated the contrary. *McDonald v. McDonald et al.* (1903), 33 S.C.R. 145; *Kendrick v. Dominion Bank and Bownas* (1920), 48 O.L.R. 539, 58 D.L.R. 309, distinguished.

Judgment of Hogg J., *ante*, p. 149, reversed.

AN APPEAL by the plaintiff from the judgment of Hogg J., *ante*, p. 149, [1945] 1 D.L.R. 657, dismissing the action. The facts are fully stated in the reasons for judgment.

14th, 15th and 16th May 1945. The appeal was heard by HENDERSON, ROACH and MCRUER JJ.A.

G. D. Watson, for the plaintiff, appellant: There are three essentials necessary to constitute a valid *donatio mortis causa*. There must not be simply a handing over of the gift. It must be made in contemplation of death and upon the condition that it is only to be absolute and complete upon the donor's death, and there must be delivery of the subject-matter of the donation. [HENDERSON J.A.: The most important question here is whether the deceased had anything of his own to give.] Reference is made to 15 Halsbury, 2nd ed. 1934, p. 693. The deceased did not contemplate death at the time he gave the respondent the cheque, since she admits that he said to her "When I get better you give it to me back." [ROACH J.A.: Since the deceased signed a cheque in favour of his sister, he must have had some-

thing in mind.] It may have been his opinion that since the appellant was working, his sister would be more able to attend to his affairs. There seems no logical explanation as to why he would wish to benefit his sister at this particular time. [McRUER J.A.: It is your position that a transfer of money made under the circumstances in the absence of evidence to the contrary, creates a resulting trust to the donor?] Yes: see 16 Halsbury, 2nd ed. 1935, pp. 666-8 and 33 Halsbury, 2nd ed. 1939, pp. 141-2; *Cook v. Addison* (1869), L.R. 7 Eq. 466 at 470-1. There is a resulting trust in favour of the appellant since she handed her money to the deceased. If there is no accurate accounting available and the two sources of moneys which were deposited in Eppler's name cannot be separated, then the appellant is entitled to the whole or part of the mixed fund; *In re Oatway*; *Hertslet v. Oatway*, [1903] 2 Ch. 356; *Burkett v. Ott*, 41 O.L.R. 578, 41 D.L.R. 676, reversed 57 S.C.R. 608, 45 D.L.R. 757; 33 Halsbury, pp. 330-2. [McRUER J.A.: Your point is that the evidence must show that the property is to pass on death, and not before death?] Yes, and surely the deceased would not denude himself of all his assets when he was under obligation to account to the appellant for moneys received from her. If there was an intended gift of \$9,000 to the respondent, the transaction was so improvident as to be unreal: *McPhail v. Maloney, et al.*, [1937] O.W.N. 48. [HENDERSON J.A.: I do not see that improvidence affects the question.]

E. G. Black, K.C., for the defendant, respondent: There was a valid *donatio mortis causa*. It was made in contemplation of death; there was delivery of the cheque, and if the deceased had recovered, the money was to be returned to him. If the Court should find that any part of the \$9,000 received by the respondent is money representing the savings or contributions of the appellant, it will be contended that there is such uncertainty that no trust can result: *Wilde v. Wilde* (1873), 20 Gr. 521; *Brighouse v. Morton*, [1929] S.C.R. 512, [1929] 3 D.L.R. 91. [HENDERSON J.A.: The strongest piece of evidence on your behalf is where the deceased says to the respondent, "When I get better you give it to me back."] The appellant, in a supplementary notice of appeal, has raised the question of corroboration, which was not argued at the trial. Corroboration is anything which assists the judicial mind, and need not be the evidence

of another witness; *McDonald v. McDonald et al.* (1903), 33 S.C.R. 145. [ROACH J.A.: A fact which is consistent with two propositions corroborates neither of them.] We rely also, upon the case of *Kendrick v. Dominion Bank and Bownas* (1920), 48 O.L.R. 539, 58 D.L.R. 309. The cheque is sufficient corroboration; *Ollson v. Fraser, Barned and Powell*, [1945] O.R. 69, [1945] 1 D.L.R. 481.

G. D. Watson, in reply: A distinction must be drawn between the handing over and the *donatio*. In *McDonald v. McDonald et al.*, (1903), 33 S.C.R. 145, the real question was whether there was corroboration of the handing over. In the case at bar, the only question is, was there *donatio* at the time of the handing over, and if so, was there corroboration? [HENDERSON J.A.: In the *McDonald* case the deceased had formed the express desire that the amount of \$6,000 should not form part of his estate.]

Cur. adv. vult.

8th June 1945. The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal by the plaintiff from the judgment of Hogg J., following the trial of this action without a jury at the city of Toronto. By the said judgment the plaintiff's action was dismissed with costs. The plaintiff is the sole executrix and beneficiary under the will of Peter Eppler, and brings this action as executrix and also in her personal capacity. Eppler died at the city of Toronto on 13th January 1944.

The plaintiff was not married to Eppler, but they had lived together in the relationship of husband and wife from 1931 until the date of his death. The plaintiff had been married in 1922 to one Wzchosta, but they had separated several years before she met Eppler. The defendant is a married sister of the deceased.

The plaintiff's claim is to recover from the defendant the sum of \$9,000, which, as the evidence discloses, was transferred to the defendant by Eppler on 6th January 1944, by a cheque signed by him payable to the defendant and drawn on an account which stood in the name of Eppler alone in a branch of the Bank of Montreal at Toronto. The plaintiff alleges that that money was received by the defendant for the use of Eppler, or, in the

alternative, that the defendant fraudulently obtained that money and converted it to her own use.

The defendant pleads that the money was a *donatio mortis causa* made to her by Eppler.

Out of the pleadings and the evidence, two issues emerge: First: Did the money in that account belong to Eppler alone, or was he holding the whole or part of it in trust for the plaintiff? Secondly: If the whole or part of it belonged to Eppler, was there a valid *donatio mortis causa*? The learned trial judge decided both those issues against the plaintiff.

The evidence is not clear as to the year in which the plaintiff separated from her husband. At one place in the evidence she stated that it was in 1921, at another place that she could not remember, that it was a long time back. On her examination for discovery she had stated that it was in 1924. In whatever year it may have been, it is said that the plaintiff then had \$100 in her possession. She stated in evidence that from that time forward until she began living with Eppler, she was steadily employed and saved her earnings and kept them in her trunk, and that by the time she began living with Eppler she had saved a total of \$2,800, all of which was in her trunk. According to the plaintiff, after she began living with Eppler she continued to work steadily, but from that time forward she handed over all her earnings to Eppler.

In 1931 Eppler had a savings account in the Bank of Montreal, which account was continued until his death. As of 30th January 1931, the credit balance in that account was \$287.84. In each of the years thereafter up to 1933, inclusive, there was deposited in the said account the sums following, namely, in 1931, \$220.00; in 1932, \$330.00; in 1933, \$280.00, and in none of the years 1931 to 1933 inclusive were there any withdrawals.

On 15th June 1934, an account was opened in the name of Eppler in the Imperial Bank of Canada, Queen and Bathurst Streets Branch, account no. 1353. On 26th March 1934, an account was opened in the name of the plaintiff in the Imperial Bank of Canada, Yonge and Richmond Streets Branch.

An analysis of the deposits in and withdrawals from the three bank accounts from 1934 to the date of Eppler's death is as follows:

Year	Bank of Montreal Eppler's original Account		Imperial Bank Eppler's Account		Imperial Bank Plaintiff's Account	
	Deposits	Withdrawals	Deposits	Withdrawals	Deposits	Withdrawals
1934	\$ 0	\$ 0	\$ 200	\$ 0	\$ 440	\$ 0
1935	860	500	350	0	263	0
1936	290	0	260	0	139	0
1937	300	0	430	0	329	0
1938	230	0	394	0	342	0
1939	0	0	223	0	247	0
1940	470	3,000	200	2,090	30	0
1941	0	0	65	0	0	0
1942	0	0	200	31.30	10	1,700
1943	9,000	0	0	0	0	0

As of the date of Eppler's death there was a credit balance in the plaintiff's account of \$293.83. There were no deposits in that account thereafter, and in 1944 the plaintiff withdrew two amounts of \$100 and \$150 respectively.

The trial judge, in his reasons for judgment, stated that it was difficult to follow the plaintiff's evidence with reference to the manner in which her wages and those of Eppler were dealt with and that her testimony in some respects was "inconsistent, vague and confused." She swore that the earnings of each of them were put in the trunk and that when their accumulated earnings or savings amounted to approximately \$200, they were deposited in the bank. The record of deposits is not entirely consistent with that statement. On 13th November 1940, the sum of \$470 was deposited in Eppler's account in the Bank of Montreal, by the plaintiff. That was the only deposit in that account that year, and it was deposited to bring the credit balance in that account up to \$3,000 odd, so that a cheque could be issued on the account for \$3,000 in connection with the purchase of a steam bath business to which I will later refer. That money was not withdrawn from the plaintiff's account, and that fact fits in with the plaintiff's contention that there was some other depository, namely, the trunk. The deposits in the plaintiff's account up to the end of 1939 were reasonably regular and in every instance, except one, the deposit was of a sum less than \$100. In the six years from 1934 to 1939 inclusive, there would appear to have been thirty-four deposits made in that account, not including the deposit of \$220 when the account was first opened, and of them ten only were of sums in excess of \$50.

The plaintiff swore that although the account stood in her name, it was in fact no different from the other accounts, that is to say, that it contained money belonging to both her and Eppler.

The plaintiff had sworn on her examination for discovery, and early during the trial, that she never at any time had a bank account, that there were only the other two accounts, and that, as she put it, "everything was in his own name". Then after the defendant at the trial proved the existence of this third bank account, the plaintiff in reply admitted it but stated that it was Eppler's money. When asked where the money came from that went into that account she replied, "I only deposited \$40.00 and when I get together with my man he told me to keep on depositing there for his account . . . he worked somewhere in the west and all I know sufficient he would come and give me the money and I would deposit it."

On 29th August 1942, the plaintiff withdrew \$1,700 from that account. She swore that Eppler was with her and that the teller in the bank handed the money to him. There was other independent evidence, which the trial judge accepted, that Eppler was not even present when that money was withdrawn. That money was not re-deposited in any of the bank accounts, and there is no suggestion throughout the evidence that it was immediately used for any specific purpose. That again would fit in with the plaintiff's contention that there was some other depository. There is some evidence to the effect that there came a time when both the plaintiff and Eppler became sceptical that perhaps in the war emergency the Government might confiscate moneys on deposit in banks. That would afford some explanation for the fact that this sum of \$1,700 was withdrawn, leaving a balance in that account of only \$281.73, and that there was a decided falling-off of the deposits in all the bank accounts commencing in 1941.

On the application by the plaintiff for probate of Eppler's will, the money in the account standing in the plaintiff's name was not included in the inventory of the deceased's estate.

In his reasons for judgment the learned trial judge stated that he found "it difficult to give credit to the plaintiff's testimony that all of her earnings were turned over to Eppler and that the amounts representing not only the bank accounts in his name but also the account in her name, consist of the mixed earnings

of herself and Eppler. It is not easy to understand, and I do not accept the plaintiff's statement that the funds in her own account were in reality deposited there for the use of Eppler."

On reading the plaintiff's evidence I find the same difficulty that the learned trial judge found on hearing it. There is, however, other independent evidence that the plaintiff and Eppler were pooling their earnings and the learned trial judge has made no reference to that other evidence.

In November 1940, Eppler became a partner in a steam bath business on Bathurst Street, known as the Oakleaf Steam Baths. The purchase price of the partnership interest was \$5,000. To pay that price Eppler, on 13th November 1940, withdrew \$2,000 from his account in the Imperial Bank, and \$3,000 from the Bank of Montreal. The fact that all the purchase money came out of these two accounts, both standing in Eppler's name alone, and none of it out of the plaintiff's account, is important in view of other evidence to which I at once refer. One Tkaczuk was also a partner in that business. He gave evidence and was asked if he had any conversation with Eppler about the \$5,000 which Eppler put into that business. In reply he said; "Yes, we talked. We [meaning the partners] said 'How is that money come'? He said, 'Me and my wife and I are working together for that money'."

Another witness, Kowtun, was apparently an intimate acquaintance of both Eppler and the plaintiff. He testified that on one occasion at his home he and the plaintiff and Eppler were discussing the venture into the steam bath business and Eppler said, "Yes, we both work for money and we tried to make business." Kowtun was apparently sceptical of the venture and said: "Good luck to you but you must have lots of money", to which Eppler replied, "Me and my wife together and my friend we share and we are going to build business."

After Eppler became a partner, the plaintiff worked for a while in the business doing physical labour and while he continued to be a partner she frequently attended meetings of the partners. In September 1942, Tkaczuk retired from the partnership, and of the amount required to pay him off, the sum of \$500 was paid to him by Eppler. Speaking of that occasion Tkaczuk said in evidence that both Eppler and the plaintiff attended with him before the lawyer and the plaintiff produced the money.

That money did not come out of either of Eppler's accounts, again leading to the conclusion that there must have been some other depository. It is, perhaps, not without significance that it was on 29th August of that year that the plaintiff had withdrawn \$1,700 from her own account.

On 15th August 1942 the plaintiff and Eppler made what I think it is reasonable to conclude were intended to be mutual wills. By her will the plaintiff gave her entire estate to Eppler and appointed him sole executor. By his will he appointed the plaintiff sole executrix and gave her his entire estate, specifically mentioning the steam bath business and the lands and premises where that business was operated.

On 7th October 1943 Eppler sold his interest in the steam bath business for \$9,200, and \$9,000 was deposited in the Bank of Montreal account. Apparently for some time prior to that sale Eppler was in ill health. His condition of health was the subject of discussion with his associates at the bath house and there is evidence that on several occasions he said to them that if anything should happen to him there was "an agreement" or "it had been fixed" that the business and money would go to the plaintiff. On 5th April 1943 Eppler and the plaintiff purchased a house on Bathurst Street. The deed was taken in their names as joint tenants. The purchase price was \$3,000. It was paid in cash, not by cheque. Where did the money come from? There were no withdrawals from any of the bank accounts on or near that date. The plaintiff swore that \$2,800 of that purchase price was her savings which she had on hand when she first began living with Eppler, and which all the while she had kept in her trunk. My conclusion is that notwithstanding the difficulty in understanding some of the plaintiff's evidence, on the whole evidence it should be held that all the money in the two bank accounts which stood in Eppler's name did not belong to him alone, and that they represented the mixed savings of the plaintiff and Eppler, and that the independent evidence to which I have referred sufficiently corroborates the plaintiff's evidence to that effect. Just how much of it belonged to the plaintiff and how much of it to Eppler it might be difficult to ascertain, but that would not be necessary if the defendant failed in her contention that the sum of \$9,000, transferred to her on 6th January 1944, was a valid *donatio mortis causa*, because under Eppler's will the plaintiff in any event takes the whole of his estate.

Then was it a valid *donatio mortis causa*?

As pointed out by the learned trial judge in his reasons, there are three essential conditions, all of which must combine in order to create an effective *donatio mortis causa*: first, the gift must have been made in contemplation, though not necessarily in expectation, of death; second, there must have been delivery to the donee of the subject-matter of the gift; third, the gift must be made under such circumstances as to show that the thing is to revert to the donor in case he should recover.

In 1943 Eppler became ill, in fact he did not work after 7th October of that year. He was attended by Dr. Lehto, who pronounced him suffering from malignant hypertension. In the latter part of 1943 he was confined in Mount Sinai Hospital. He returned from that hospital to the living quarters occupied by him and the plaintiff, and on 26th December he and the plaintiff moved to the residence of the defendant and her husband and occupied a room in that residence. The defendant stated that almost immediately upon the arrival of Eppler and the plaintiff at her home, Eppler told her that he wanted to give her \$9,000 and asked her to have a cheque prepared for that amount. She obtained a cheque book one or two days prior to 5th January. On 5th January Eppler was taken to the Toronto General Hospital. After he had been removed to the hospital, Mrs. Fraser, for whom the defendant had formerly worked as a domestic servant, called at the defendant's residence, and there is no doubt that the defendant then asked Mrs. Fraser to make out the cheque, which Mrs. Fraser did. On the following day the plaintiff and the defendant visited Eppler in the hospital, the defendant taking the cheque book containing the prepared cheque in her purse. On their arrival at the hospital, after some conversation, Eppler asked the plaintiff to get him a glass of water and to telephone the doctor, and in the absence of the plaintiff Eppler signed the cheque and gave it to the defendant, and the defendant subsequently cashed it. Eppler was removed from the hospital to the defendant's residence three or four days prior to 13th January, and on 13th January he died. The plaintiff had no knowledge of this cheque having been given to the defendant until after Eppler's death.

Without reviewing the evidence, it will suffice to say that I am not in any doubt that the transfer by Eppler to the defendant of

the sum of \$9,000 was made in contemplation of death. I am also satisfied that the transfer was made on the condition that if Eppler recovered, the money was to be transferred to him.

I am not at all satisfied that the transfer was by way of gift, and in my opinion there was not that clear and satisfactory proof of the gift that is necessary to establish a *donatio mortis causa*. The idea of Eppler on his death transferring practically the whole of his estate to the defendant as a gift to her is repugnant to everything that the deceased did or said from which his intention could be ascertained. If he attempted thus to dispose of that money he was attempting to commit a fraud on the plaintiff, because in my opinion it was not all his to give. I have no hesitation in declaring that by reason of the circumstances of this case, the inference that it was not intended as a gift is so strong that the allegation of the defendant that it was intended as a gift would require corroboration of a most convincing character. This is not a case in which it can be said that, having regard to all the circumstances, it is equally consistent that Eppler intended the transfer to be a *donatio* as that he intended it for some other purpose. I have looked in vain for any evidence that corroborates the defendant's contention.

There is the evidence of Mrs. Fraser that after Eppler had been brought back from the hospital to the defendant's home he told her that the cheque which she had made out was all right. That, surely, is not corroboration of a *donatio*. Certainly the cheque was "all right" for whatever purpose it was intended, but Mrs. Fraser's evidence throws no light on what that purpose was.

In support of his argument that there is, in the evidence, sufficient corroboration of the defendant's statement that the transfer was a *donatio*, counsel for the defendant relied upon *McDonald v. McDonald, et al.* (1903), 33 S.C.R. 145, and *Kendrick v. Dominion Bank and Bownas* (1920), 48 O.L.R. 539, 58 D.L.R. 309, both of which have been referred to by the trial judge in his reasons. Both of those cases can be distinguished on the facts from the case at bar.

In the *McDonald* case, the donor, being ill and not expecting to recover, requested his wife, his brother being present at the time, to get from his trunk a bank deposit receipt for \$6,000 which he then handed to his brother telling him that he wanted the money

equally divided among his wife, brother and a sister. The brother then, on his own suggestion or that of the donor, filled out three cheques for \$2,000 each payable out of the deposit receipt to the respective beneficiaries. The donor signed these and returned them to his brother, who handed to the wife the one payable to her, together with the deposit receipt, and she placed them in the trunk from which the receipt had originally been taken. It was held, Sedgewick and Armour JJ., dissenting, that this was a valid *donatio mortis causa* of the deposit receipt and the interest which it bore. At p. 150 Taschereau C.J. said: "It is not the cheques or orders that he gave. Those were merely given, upon Daniel's [the brother's] suggestion, to ensure the execution of the gift of the deposit receipt and as evidence of the way in which the donor intended the division of the proceeds thereof to take place amongst the three donees." Davies J., at p. 157, said: "As to the corroborative evidence, I think once a *donatio mortis causâ* of the deposit receipt is found, there is ample 'corroboration by material evidence' of the testimony of the plaintiffs in the three orders signed by Dr. McDonald just after he made the gift," and Mills J., at p. 159, said: "There can be no dispute of this, that he signed three orders for \$2,000 each, to be paid to the parties out of the deposit receipt. Does this not disclose clearly an intention to divide the sum for which the deposit receipt was held equally between the three donees?" And at p. 160: "Looking at what he did over his own signature, I think it is more reasonable to hold that he gave to the parties named the whole sum for which the deposit was held, and that the orders which were given were intended to shew simply how the sum was to be divided."

In the *Kendrick* case, the donor on his death-bed gave to the defendant Bownas his bank pass-book and his cheque payable to her order for the full amount standing to his credit at the bank. It was held that there was a valid *donatio mortis causa*. As appears from the judgment of Meredith C.J.O., at p. 541, counsel for the plaintiff, the appellant, contended, *inter alia*, that there was not that clear and satisfactory proof of the gift that is necessary to establish a *donatio mortis causa*; and also that there was not such corroboration of Bownas' evidence as was required by The Evidence Act (now s. 11 of R.S.O. 1937, c. 119).

Dealing with the first contention, the Chief Justice said: "The testimony of the respondent Bownas was uncontradicted,

and the probabilities of the case were all in favour of the truth of it. The deceased had been separated from his wife for many years, and apparently they were not on friendly terms. The respondent Bownas was an intimate friend of his; it was to her that he went when he became ill of the disease of which he died; she it was who consulted a doctor as to his condition and made arrangements for his admission to the Wellesley Hospital and looked after him there; and she it was who made the arrangements for his funeral and paid the expenses of it. His wife did not visit him in his illness or attend his funeral, nor did the appellant, who is his brother, do so.

“What was more likely, in these circumstances, than that he should bestow upon the respondent Bownas the comparatively little of the world’s goods that he possessed?”

Then at p. 546, dealing with corroboration, the Chief Justice continued: “The attendant facts and circumstances to which I have referred in dealing with the first question, the possession by the respondent Bownas of the two pass-books and the two cheques [the other pass-book was one issued by another bank and the other cheque was one signed by the donor payable to Bownas on that account], in my opinion afford the corroboration which the statute requires”, citing *McDonald v. McDonald et al.*, *supra*. It is noteworthy that the Chief Justice immediately added: “If what was done was as consistent with the deceased’s intention in delivering the pass-books and the cheques to the respondent Bownas for some purpose other than that of making a *donatio mortis causa* as with his intention having been to make that donation, doubtless what I rely on as corroboration would not be corroboration; but, in my opinion, any suggestion that the purpose was any other than that of making the *donatio* has no support whatever in any reasonable view of the evidence.”

In the *McDonald* case, the giving of the three cheques was corroboration of the intention to make a gift of the deposit receipt in equal proportions among the beneficiaries. In the *Kendrick* case “the probabilities of the case were all in favour of the truth of” the story told by the beneficiary: The “attendant facts and circumstances” referred to by the Chief Justice made it likely that the donor would make the gift. Added to that was the possession of the bank books and cheques.

In the case at bar, there is nothing in the evidence corroborating the defendant's statement that Eppler gave her the cheque as a *donatio*. Indeed, in my opinion, the only reasonable view of the evidence is that the cheque was not a *donatio*. Unlike the facts in the *Kendrick* case, there is nothing here suggesting any reason why the defendant would be the subject of the deceased's bounty, to the extent of practically his whole estate. That in the last few days of his life, namely from 26th December 1943, the defendant showed some kindly consideration for her brother, is not disputed. It was a sisterly act deserving of appreciation, but it is not indicative of any close intimacy between the deceased and the defendant. Indeed, the defendant on cross-examination admitted that in the ten or twelve years during which Eppler had lived with the plaintiff, she, the defendant, had not seen him very often, and on the occasions when she did see him the plaintiff was usually with Eppler. Eppler had been in Mount Sinai Hospital for three weeks in the fall of 1943, but this defendant had not gone to see him. The plaintiff had, and on one occasion, while she was visiting with him at Mount Sinai Hospital, one Mrs. Elchalyna also came to visit Eppler. Mrs. Elchalyna gave evidence, and speaking of that occasion said that the plaintiff was weeping and that Eppler said to Mrs. Elchalyna 'Let her not weep, she has money, she has property, she will buy for me \$175 coffin or funeral, she doesn't have to worry, she has enough to sustain herself on until her very last day.' On the evidence this would not be so if this defendant is to get the \$9,000.

The witness Kowtun testified that he recalled on one occasion talking with Eppler and the sister's name was introduced into the conversation and Eppler said: "My sister is for herself and I am for myself."

There is some evidence that at one time Eppler had said that he intended to leave his money to a niece, a daughter of the defendant, but the trial judge, referring to that evidence, said that he did not think a great deal of weight was to be attached to the statement; neither do I.

The learned trial judge referred to the fact that Eppler by his will had bequeathed his interest in the steam bath to the plaintiff, but pointed out that that was "several years before his death, and the interest in the baths had been disposed of in the meantime." It is true that they had been so disposed of but the full

sale price, less what was probably expenses incidental to the sale, had been deposited in the very bank account on which the cheque for \$9,000 was drawn.

The impression created by the whole of the evidence is that here were two people who, although not married to one another, were living in the relationship of husband and wife, both hard-working, industrious and thrifty, pooling their earnings and investing them in the steam bath business, and each having total confidence in the other. The written word—the will—the spoken word as shown by the evidence of independent witnesses, and all the other attendant circumstances to which I have referred, in my opinion lead to the irresistible conclusion that the transfer of \$9,000 to the defendant must have been for some other purpose than a *donatio* and that it would be absolutely illogical and unnatural that the deceased would make that gift to the defendant.

For the reasons stated the appeal should be allowed and judgment should be entered for the plaintiff, declaring that in her capacity as executrix of Eppler's will she is entitled to repayment by the defendant of the said sum of \$9,000, and any accretion thereto, and directing the respondent to pay the same to her. The plaintiff should have her costs of the action and of this appeal against the defendant Szczepkowski, those costs to include any costs which may have been awarded against the plaintiff in favour of the defendant bank.

The Court was informed by counsel that, by arrangement between them, pending the final determination of this action, the whole of the money in question has remained on deposit with the defendant bank. If any authorization is necessary for the payment of that money to the plaintiff, an appropriate provision therefor may be included in the formal judgment.

Appeal allowed with costs throughout.

Solicitors for the plaintiff, appellant: Smith, Rae, Greer & Cartwright, Toronto.

Solicitor for the defendant Szczepkowski: E. G. Black, Toronto.

Solicitors for the defendant Imperial Bank of Canada: White, Ruel & Bristol, Toronto.

[ROACH J.A.]

[COURT OF APPEAL.]

Re Brown and Brock and the Rentals Administrator.

Certiorari—Judicial and Administrative Tribunals—Rentals Administrator—Effect of Taking Away Remedy—Jurisdiction—Audi alteram partem—Orders in Council P.C. 8528/1941 and 9029/1941, as amended—Order No. 315, The Wartime Prices and Trade Board—The Judicature Act, R.S.O. 1937, c. 100, s. 62—Rules 622, 623.

A Rentals Administrator, exercising the powers conferred upon him under Order No. 315 of the Wartime Prices and Trade Board, under the authority of P.C. 9029/1941, is exercising administrative and not judicial functions, and his orders are consequently not removable by *certiorari*, or by the proceedings substituted therefor by s. 62 of The Judicature Act. *Re Ashby et al.*, [1934] O.R. 421, referred to.

Per ROACH J.A. (these points not being dealt with by the Court of Appeal):

Section 15(2) of P.C. 8528/1941, as amended, has not the effect of depriving the Supreme Court of Ontario of jurisdiction to quash an order made by a judicial tribunal purporting to act under the Order in Council or any other Order in Council to which s. 15(2) is applicable, but the power to quash can be exercised only if there is a manifest defect of jurisdiction, or manifest fraud in obtaining the order. *The Colonial Bank of Australasia et al. v. Willan* (1874), L.R. 5 P.C. 417; *Rex v. Nat Bell Liquors, Limited*, [1922] 2 A.C. 128, applied.

Even where the statute creating a tribunal does not expressly so require, it is an essential prerequisite to the exercise of jurisdiction that any party whose rights may be affected by the decision should be given notice of the proceedings, and an opportunity to be heard. *Innes v. Wylie et al.* (1844), 1 Car. & Kir. 257; *Spackman v. The Plumstead District Board of Works* (1885), 10 App. Cas. 229; *Local Government Board v. Arlidge*, [1915] A.C. 120, and other authorities, applied.

A MOTION for an order in lieu of *certiorari*. The facts are fully stated in the reasons for judgment.

24th and 25th April 1945. The motion was heard by ROACH J.A. in chambers at Toronto.

R. H. Greer, K.C. and *H. M. Finkle*, for Joe Brown, applicant.

G. A. Gale, and *J. D. Arnup*, for the Rentals Administrator, respondent.

H. F. Parkinson, K.C., for Louis Brock, respondent.

9th May 1945. ROACH J.A.:—This is a motion, by way of *certiorari*, for an order that the Rentals Administrator under the Wartime Prices and Trade Board be required to bring into this court all proceedings and papers in the matter of a certain application for exemption from the provisions of Order No. 315 of the Wartime Prices and Trade Board of the commercial accommodation referred to in the style of cause, in respect of which premises an order for such exemption was made by

R. E. B. Brocklesby, Deputy Rentals Administrator of the Wartime Prices and Trade Board, and "that the Court may further cause to be done thereupon as it shall see fit to be done"; and for an order staying all proceedings under the said application and order.

On this motion provisions contained in various Orders in Council, all of which were passed under the authority of The War Measures Act, R.S.C. 1927, c. 206, and certain Orders of the Wartime Prices and Trade Board, are to be considered, and it may be well to state them at the outset.

Order in Council P.C. 8528, passed on 1st November 1941 (75 Canada Gazette 1544; reprinted with amendments, [1944] 4 C.W.O.R. 90), is entitled "The Wartime Prices and Trade Regulations". The relevant sections of it are as follows:

Section 3(1) establishes the Board.

Section 15(2) as enacted by P.C. 5109/1942 ([1944] 4 C.W.O.R. 100) and amended by P.C. 3206/1943 ([1944] 4 C.W.O.R. 109): "No proceedings by way of injunction, mandatory order, mandamus, prohibition, certiorari or otherwise shall be instituted against any member of the Board, Administrator or other person for or in respect of any act or omission of himself or any other person in the exercise or purported exercise of any power, discretion or authority or in the performance or purported performance of any duty conferred or imposed by or under these regulations or any regulations for which these regulations are substituted or otherwise conferred or imposed by the Governor in Council."

Order in Council P.C. 9029, passed 21st November 1941 (75 Canada Gazette 1820, reprinted with amendments [1944] 4 C.W.O.R. 117), is entitled "The Wartime Leasehold Regulations." The relevant sections thereof are as follows:

Section 2(1)(a): "'Board' means the Wartime Prices and Trade Board."

Section 2(1)(k), as re-enacted by P.C. 3207/1943 ([1944] 4 C.W.O.R. 126): "'Rentals Administrator' [means] . . . the person duly appointed as such by the Board with the approval of the Governor in Council, and [includes] . . . any person similarly appointed as a Deputy Rentals Administrator."

Section 3(1)(k) gives to the Board power "to prescribe the grounds on which and the manner in which leases may be

terminated, and to prohibit termination of leases or eviction or dispossession of tenants except in accordance with such prescription."

Section 3(5), as enacted by P.C. 3207/1943, *supra*: "The Board may exercise its powers by order and may from time to time delegate to any person and authorize him to exercise from time to time such of the powers of the Board on such terms as the Board deems proper; and the signature or counter-signature by the Chairman of any order purporting to have been made by such person under the authority of the Board shall be conclusive evidence of such authority."

Section 14, as re-enacted by P.C. 386/1943 ([1945] 1 C.W.O.R. 131): "... the provisions of ... Section 15 of [the Wartime Prices and Trade] Regulations shall be construed as if such ... provisions were also included in these regulations."

Pursuant to the authority conferred on it by Order in Council P.C. 9029, the Board made an Order, No. 315 ([1943] 4 C.W.O.R. 818), "Respecting Maximum Rentals for Commercial Accommodation". This Order became effective as of 1st October 1943. The Board also made an Order, No. 470 ([1945] 1 C.W.O.R. 43), dated 29th December 1944, effective as of 2nd January 1945, amending Order No. 315 and inserting therein a new Part II, respecting termination of leases; and another Order, No. 478 ([1945] 1 C.W.O.R. 277), dated 31st January 1945, effective as of 1st February 1945, further amending Order No. 315. The relevant sections of Order No. 315 as amended are as follows:

Section 12. "Except as provided in Sections 13 and 14, no tenant of any commercial accommodation shall be dispossessed of such accommodation, or be evicted therefrom and no landlord shall demand that any tenant vacate or deliver up possession of any commercial accommodation."

Sections 13 and 14 do not contain any provisions taking the tenancy here in question out of the operation of s. 12.

Section 26: "(1) Notwithstanding anything contained in this Order, a Rentals Administrator may . . .

"(d) exempt any lease from any provision of this Order, effective on and after such date as he may designate; . . ."

"(2) A Rentals Administrator shall have the powers of a commissioner appointed under the Inquiries Act.

“(3) The method and procedure of exercising his powers shall be such as a Rentals Administrator may adopt.

“(4) The decision of a Rentals Administrator shall be final and conclusive.”

Section 1(h): “ ‘Rentals Administrator’ means a person appointed as such by the Board and includes any person similarly appointed as a Deputy Rentals Administrator.”

The facts of this case which are not in dispute are as follows:

By a lease in writing, dated 15th January 1944, Louis Brock, as landlord, leased to the applicant, Joe Brown, and to one Jack Grossman, as tenants, certain commercial accommodation on Spadina Avenue, in the city of Toronto, for a term of one year expiring on 14th January 1945, at a rental payable \$50 monthly on the 15th day of each month. The lease contains a provision that upon the determination thereof by effluxion of time a tenancy from year to year shall not be created by implication of law but the lessees shall be deemed to be monthly tenants only. By letter dated 4th January 1945, the solicitor for the landlord advised the tenant Brown that he required the tenant to give up possession of the premises on 14th January 1945.

On 16th January 1945, the tenant Brown paid to the landlord \$50 on account of rent, by a cheque which was cashed on 24th January.

By letter dated 26th January the solicitor for the landlord forwarded to the tenant a certified cheque for \$50 in intended repayment of the rent paid by the tenant on 16th January, and stated that in December 1944 the landlord had agreed to rent the premises in question to a third party and to give him possession on 1st February 1945. He made some reference to Order No. 470 and demanded immediate possession of the premises in question. Further correspondence was exchanged between the solicitors for the parties, the entire contents of which need not be stated; suffice it to say that the cheque for \$50 was returned to the landlord's solicitor and the rent which would ordinarily become due on 15th February was tendered and refused.

An order, entitled “Administrators Order”, signed by R. E. B. Brocklesby, Deputy Rentals Administrator and dated the 12th day of February 1945, has given rise to this motion. That order was made in respect of the premises in question and recites that it has been shown to the satisfaction of the Rentals Administrator that prior to 2nd January 1945, the landlord agreed to give

occupancy of the said premises to one Louis Tuber from and after the expiration of the lease then in effect and that Order No. 315 as amended prevents the fulfilment of that agreement unless an order be made exempting the lease from the provisions of Order No. 315. The order then provides that "pursuant to authority conferred by the Wartime Prices and Trade Board [the lease of the accommodation in question] is hereby exempted from the provisions of Part II of Order No. 315 of the Board."

That order was made on the application of the landlord and without any notice to the tenant, and without the consent of the tenant, and without the tenant being given any opportunity to make any representations or be heard in respect thereof. The first knowledge the tenant received of this order was when he received it by mail from Ottawa without any covering letter.

On the hearing of this motion counsel for the Rentals Administrator raised what he conceived to be a preliminary objection, namely, that by reason of s. 15(2) of Order in Council P.C. 8528, which is incorporated in and made part of Order in Council P.C. 9029, this proceeding is barred, and later, during the argument on the merits, he contended that security was required to be deposited by the applicant as a condition precedent to his right to have this motion heard. That first objection is not, in its nature, a preliminary objection but, if it is sound, it would be an answer to any case that the applicant might make that he was otherwise entitled to the order now sought. I reserved judgment on his preliminary objection and now proceed to dispose of both those arguments.

Certiorari provides a means by which a superior court is enabled to examine the proceedings in an inferior court or tribunal to see whether the order or judgment of the inferior court was made within its jurisdiction. Except where it is alleged that the order or judgment was obtained by fraud, the jurisdiction of the superior court is limited in its inquiry to the question of jurisdiction of the inferior court or tribunal.

What effect is to be given to a privative enactment which purports to take away the right to *certiorari*? The leading case on the point is *The Colonial Bank of Australasia et al. v. Willan* (1874), L.R. 5 P.C. 417. It was there held that the power to remove the proceedings from the inferior court to the superior court had been taken away by statute. After so stating, the judgment of the Privy Council continues as follows, at p. 442:

"It is, however, scarcely necessary to observe that the effect of this is not absolutely to deprive the Supreme Court of its power to issue a writ of *certiorari* to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a *certiorari*; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it."

Then, dealing with the subject "Want of Jurisdiction" the judgment proceeds: "In order to determine . . . [it] it is necessary to have a clear apprehension of what is meant by the term 'want of jurisdiction'. There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry."

In *Reg. v. Bolton* (1841), 1 Q.B. 66, 113 E.R. 1054, which was a case in which *certiorari* had not been taken away, Lord Denman C.J. said:

"All that we can then do . . . is to see that the case was one within their [the magistrates'] jurisdiction, and that their proceedings on the face of them are regular and according to law."

In *Rex v. Nat Bell Liquors, Limited*, [1922] 2 A.C. 128, 37 C.C.C. 129, 65 D.L.R. 1, [1922] 2 W.W.R. 30, the Privy Council has held (p. 154, A.C., p. 21, D.L.R.) that "The law laid down in *Reg. v. Bolton* has never since been seriously disputed in England. In *Colonial Bank of Australasia et al. v. Willon* the Judicial Committee settled that the same rules are applicable to the Dominions, except in so far as they may be affected by competent legislation."

I do not understand that the judgment in the *Willan* case enumerates exhaustively the conditions by which the jurisdic-

tion purported to be exercised in any given case is to be tested. The main ground upon which the applicant here puts this motion, namely, the right to be heard, is not enumerated in those conditions, unless it can be said to be embraced in the words, "certain proceedings which have been made essential preliminaries to the inquiry". I think those words were intended to mean preliminary proceedings which have been made essential by statute. The case therein cited by way of illustration would support that interpretation.

The statute which confers jurisdiction may require that notice be given to anyone whose rights are to be put in jeopardy, before the tribunal enters upon its inquiry. *Reg. v. Arkwright* (1848), 12 Q.B. 960, referred to in the *Willan* case, is illustrative. Compliance with such requirement is an essential preliminary to the exercise of jurisdiction.

Then what of cases in which notice of the proceedings is not expressly required by statute? Every person has an inherent right to an opportunity of being heard before he is condemned, punished or deprived of property in any judicial proceedings by any tribunal. Over one hundred years ago Lord Denman C.J. in *Innes v. Wylie et al.* (1844), 1 Car. & Kir. 257, 174 E.R. 800, in discussing the maxim *audi alteram partem*, said:

"No proceedings in the nature of a judicial proceeding can be valid unless the party charged is told that he is so charged, is called on to answer the charge, and is warned of the consequences of refusing to do so."

That principle extends to every case in which substantive rights are affected or put in jeopardy in a judicial proceeding, and is not limited to judicial proceedings in criminal matters.

In *Spackman v. The Plumstead District Board of Works* (1885), 10 App. Cas. 229, the question raised was whether a certificate fixing a general line of building and issued by the superintending architect of the Metropolitan Board of Works pursuant to the Metropolis Management Act was conclusive. The Act provided that such general line of buildings beyond which no building should be erected without the consent of the Metropolitan Board of Works was to be decided by the architect. The statute was apparently silent as to the procedure to be followed by the architect in reaching his decision. Concerning that feature of the statute the Earl of Selborne L.C., at p. 240, said:

"No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially."

In *Local Government Board v. Arlidge*, [1915] A.C. 120, the respondent Arlidge had obtained an order *nisi* for a writ of *certiorari* for the purpose of quashing an order of the Board on the ground that the Board had not proceeded in the manner provided by the law. Under the Housing and Town Planning etc. Act, 1909, local authorities were empowered to make what are referred to as closing orders, closing buildings against habitation, certain conditions having been complied with, and also to make orders determining closing orders under certain conditions. With respect to both orders an appeal was provided by the Act to the Local Government Board and the rules governing procedure on such appeals were to be such as the Board might determine. Dealing with the duty of the Board on such appeals, Viscount Haldane L.C., at p. 132, said:

" . . . when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially . . . they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal." He then refers with approval to the view expressed by Lord Loreburn L.C. in *Board of Education v. Rice et al.*, [1911] A.C. 179. That view is there expressed in the following language:

" . . . they [the Board] must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They

can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

Viscount Haldane was obviously referring to the above passage, and then, by way of reflecting Lord Loreburn's view and expressing his own, he continued:

"If the Board failed in this duty, its order might be the subject of *certiorari* and it must itself be the subject of *mandamus*."

The result of the English decisions to which I have referred is that the giving of notice and an opportunity to be heard in a judicial proceeding affecting substantive rights, even where notice is not specifically required by statute, is a condition precedent to any tribunal exercising jurisdiction which it would otherwise have.

Counsel for the Rentals Administrator argued that where *certiorari* was taken away by statute, and notice was not expressly required by statute, failure to give notice of the proceedings was not a ground for *certiorari*. To test that argument reference must be had to the *Willan* case. Referring to that part of the judgment already quoted, the privative enactment did not deprive the Supreme Court of its power under the old practice of ordering that a writ of *certiorari* issue to bring up the proceedings of the inferior court, but it controlled and limited the power of the Court to act on such writ to cases where there was a manifest defect of jurisdiction or manifest fraud.

The old practice has, of course, been changed, and writs of *certiorari* have been done away with. The practice now is regulated by s. 62 of The Judicature Act, R.S.O. 1937, c. 100, and Rules 622 and 623. Although the practice is changed, the subject is not changed: see *Rex v. Titchmarsh* (1914), 32 O.L.R. 569, 24 C.C.C. 38, 22 D.L.R. 272.

Under the old practice the writ of *certiorari* was simply for the purpose of getting the conviction or order or judgment before the superior court. If it could not be got before the superior court, of course no action could be taken on it. If it could be brought up, then, where *certiorari* was taken away, the conviction or order or judgment could be quashed only for manifest defect of jurisdiction or manifest fraud.

Under the present practice the order takes the place of the writ. Since, in this case, there is no suggestion of fraud, then, applying the law as laid down in the *Willan* case, if the Rentals Administrator should be ordered to bring the proceedings into this court, then this Court would be then called on to determine whether there was a manifest defect in the jurisdiction purported to be exercised by the administrator in making the order in question.

On a motion such as this, affidavit evidence would be admissible to prove lack of notice required by statute: see the *Arkwright* case, *supra*. I can see no reason why similar evidence is not equally admissible to prove lack of notice not required by statute, but required by common law.

For the reasons stated, I am of the opinion that section 15(2) of Order in Council P.C. 8528/1941, as amended, would not be a bar to these proceedings if the order of the Deputy Rentals Administrator is a judicial order.

Now dealing with the objection that security has not been deposited by the applicant: security is not required to be deposited in a civil proceeding such as this is; it is required to be deposited on a motion to quash a conviction under s. 62 of The Judicature Act.

I proceed now to dispose of the motion on the merits.

The first question for determination is whether the Rentals Administrator, in making the order, was acting in a judicial or an administrative capacity. It was conceded that if he was acting in an administrative capacity only the proceedings could not be moved into this court by *certiorari*.

A very excellent article, entitled " 'Administrative' Tribunals and the Courts", is to be found in vol. 49 Law Quarterly Review, p. 94. In *Re Ashby et al.*, [1934] O.R. 421, 62 C.C.C. 132, [1934] 3 D.L.R. 565, Masten J.A. delivering the judgment of the Court of Appeal, at p. 428 adopts extracts from that article as pointing out the distinction between a judicial tribunal and an administrative tribunal. They will bear repetition:

"A tribunal that dispenses justice, *i.e.*, every judicial tribunal, is concerned with legal rights and liabilities, which means rights and liabilities conferred or imposed by 'law'; and 'law' means statutes or long-settled principles. These legal rights and liabilities are treated by a judicial tribunal as pre-existing; such a tribunal professes merely to ascertain and give effect to them;

it investigates the facts by hearing 'evidence' (as tested by long-settled rules), and it investigates the law by consulting precedents. Rights or liabilities so ascertained cannot, in theory, be refused recognition and enforcement, and no judicial tribunal claims the power of refusal. . . .

"In contrast, non-judicial tribunals of the type called 'administrative' have invariably based their decisions and orders, not on legal rights and liabilities, but on policy and expediency. . . .

"A judicial tribunal looks for some law to guide it; an 'administrative' tribunal, within its province, is a law unto itself."

The true test therefore is to see what the function of the tribunal is. Is it to ascertain legal rights and liabilities or to create them? Is it to apply the law or policy as expediency? Is it to be guided by law or is it a law unto itself? In making that inquiry the statute, or as here the Order in Council, must be looked at to determine the jurisdiction which it confers and how it is to be exercised. Let us therefore look at the relevant section of Order in Council P.C. 9029/1941. By s. 3(1)(k), *supra*, the Board is empowered to fix or prescribe the grounds on which leases may be terminated and to prohibit their termination except on those grounds. The leases to which that power relates may be all or only some leases. The power of the Board is not in any way circumscribed. No limitations are imposed on the exercise of that power, and no standards by which it is to be guided are set up. It has a free hand. It is a law unto itself. It may determine its own policy, and expediency is its only guide. That is an administrative power, not a judicial power, and an order made in the exercise of it is not the subject of *certiorari*.

The applicant attempted to found an argument on the fact that the order is not countersigned by the chairman of the Board, and referred to s. 3(5) of Order in Council P.C. 9029, *supra*. The fact that it is not so signed is not an argument touching the jurisdiction of the Deputy Rentals Administrator to make the order and on this motion only the question of jurisdiction is involved. If the applicant was contending that Mr. Brocklesby was not the Deputy Administrator, then the countersignature of the chairman on the order would be conclusive evidence of Mr. Brocklesby's authority. But the applicant is not making

any such contention. Quite to the contrary, he is contending that the order was made by Mr. Brocklesby as Deputy Rentals Administrator. Not only does the style of cause so state, but in argument counsel for the applicant complained because it was signed by the Deputy Rentals Administrator. That argument could only be directed to the jurisdiction of the Deputy Rentals Administrator to make the order. The obvious answer is that he had jurisdiction under s. 3(5) of Order in Council P.C. 9029, *supra*. He made the order. Who but he would sign it?

The applicant further contended that the order does not contain any effective date as required by s. 26(d) of Order No. 315, *supra*. There is no merit in that argument. It is effective as and from the date it bears.

For the foregoing reasons this motion is dismissed. I do not think this is a case in which the applicant should be required to pay costs. The Deputy Rentals Administrator, in my opinion, might well have notified the tenant before making the order in question and given the tenant the same opportunity of attempting to persuade him against making the order as was given to the landlord of attempting to persuade him to make it. Neither do I think that the landlord should have any costs against the applicant.

Motion dismissed without costs.

15th June 1945. The applicant Joe Brown appealed, and the appeal was heard by ROBERTSON C.J.O. and LAIDLAW and McRUER JJ.A.

R. H. Greer, K.C. (H. M. Finkle, with him), for the appellant: The effect of s. 26(1)(d) of Order No. 315 is that an exemption order must state the date from which it is to be effective, and therefore without such a designation of a date the order is wholly invalid, and a nullity: *Reg. v. Foster; Estate of Esson* (1897), 30 N.S.R. 1. [ROBERTSON C.J.O.: Is *certiorari* the appropriate remedy for a wholly ineffective order?] Yes, under the authority of *Reg. v. Foster, supra*.

Subss. 2, 3 and 4 of s. 26 give powers to the Rentals Administrator which require by inference that he shall adopt some procedure whereby both sides can be heard. [LAIDLAW J.A.: What is there in the language of s. 26(3) that requires him to adopt the same procedure in every case?] That is required by natural justice, which also requires that both sides shall be

heard. This rule applies to administrative as well as judicial tribunals if, as here, they are performing judicial functions: *Errington et al. v. Minister of Health*, [1935] 1 K.B. 249 at 268, 270-2; *Rex v. Tribunal of Appeal under The Housing Act, 1919*, [1920] 3 K.B. 334; *Re General Accident Assurance of Canada*, 58 O.L.R. 470, [1926] 2 D.L.R. 390; *Local Government Board v. Arlidge*, [1915] A.C. 120.

[McRUER J.A.: Those cases apply only if the Administrator exercises judicial functions. The primary question here is whether the Administrator did exercise such functions.] [LAIDLAW J.A.: Does not the power to "exempt any lease" indicate a power to act arbitrarily, for any reason, or even for no reason? That seems to indicate an administrative rather than a judicial power.] This was clearly a dispute between landlord and tenant, referred by the Order to the Administrator, who, by his order, affected the tenant's rights. [ROBERTSON C.J.O.: Order No. 315, Part II, is not for the benefit of tenants, but in the public interest. It takes away some of the landlord's rights, but does not confer rights on a tenant. Surely the "other side" in such a matter is not the tenant's side, but rather the public interest.]

[McRUER J.A.: It must be taken that the Wartime Prices and Trade Board, in making Order No. 315, acted as a purely administrative body. If so, how can the Administrator, as the deputy of the Board, be considered as exercising even quasi-judicial functions?] Because he has powers to affect the rights of individuals: *Reg. v. London County Council; Ex parte Commercial Gas Company* (1895), 11 T.L.R. 337. [McRUER J.A.: Is that not in conflict with the *Arlidge* case?] I submit not. I refer also to *Rex v. Postmaster-General; Ex parte Carmichael*, [1928] 1 K.B. 291.

The matter of natural justice extends, in England, to practically every case in which there is a judicial determination: see *Blisset v. Daniel* (1853), 10 Hare 493, 68 E.R. 1022. Other cases are those of expulsion from clubs, and refusal of liquor licences.

Whenever an administrative body comes to the point at which it is interfering with the property or rights of individuals, it must hear both sides. In *O'Connor v. Waldron*, [1935] A.C. 76 at 82, [1935] 1 D.L.R. 260, 63 C.C.C. 1, [1935] 1 W.W.R. 1. An important factor was that the commissioner's report determined no rights. See also *Royal Aquarium and Summer and Winter Garden Society, Limited v. Parkinson*, [1892] 1 Q.B. 431.

Re Ashby et al., [1934] O.R. 421, 62 C.C.C. 132, [1934] 3 D.L.R. 565, is not an authority against my contention. The actual decision there was only that the motion for prohibition was premature, and it clearly contemplated the possibility of *certiorari* at a later stage of the proceedings. I refer also to *Re Allinson and the Court of Referees*, [1945] O.R. 477, [1945] 2 D.L.R. 717.

Maxwell on the Interpretation of Statutes, 8th ed. 1937, p. 316, states the rules as to judicial proceedings before administrative tribunals.

G. A. Gale, for the Rentals Administrator, respondent, and H. F. Parkinson, K.C., for the landlord, respondent, were not called on.

At the conclusion of the argument for the appellant, the judgment of the Court was delivered orally by

ROBERTSON C.J.O.:—We do not think it necessary to call upon you, Mr. Parkinson, or you, Mr. Gale. We have had a very full and very able argument from Mr. Greer on the aspects of the matter that he has dealt with.

Let me say at the outset that we are not to be taken as acquiescing in the view—if any such view is expressed in the judgment appealed from—that the privative clause in the Order in Council is of no effect. We express no opinion one way or another upon that. It has not been argued by Mr. Greer, and we do not think it necessary to determine the matter in disposing of this appeal. Therefore, we are not to be taken as having dealt with it.

On the matter that has been fully and capably argued for the appellant, we are of the view that the Rentals Administrator, in determining whether the lease in question should be exempted from the provisions of Order No. 315 of the Wartime Prices and Trade Board, exercised purely administrative and not judicial powers or functions. The Rentals Administrator is simply an officer appointed to administer what the Orders in Council and Regulations direct or permit to be done in the public interest.

The nature of such orders as Order No. 315 is this: that in a time of emergency and of great national danger it was deemed necessary to make private rights subordinate to the public interest in many ways. Among other things the relations between landlords and tenants arising under their leases and agreements

were brought under control and supervision in the public interest, and by Orders and Regulations made by competent authority, private rights became of minor importance and were altered or set aside as public interest was deemed to require. It is always of importance to have it in mind that the sole and sufficient warrant for this was the public interest paramount at the time.

It is, in my view, a mistake to regard the Orders and Regulations as intended to create rights in the tenant and to take rights away from the landlord, and thereby to alter their arrangements, except as it is in the public interest to do so. The Rentals Administrator is to decide in such a case as this whether or not it is in the public interest that the particular lease in question should be given exemption from the order. The rights of the landlord or tenant must give way to the public interest. That part of Order No. 315 with which we are concerned here is made expressly subject to its being declared by the Rentals Administrator not to apply to any particular lease. The order of the Administrator in question is made in the exercise of that power.

It seems clear, therefore, that what the Rentals Administrator had to do was to consider whether it was in the public interest or whether it was not in the public interest that exemption should be granted in respect of the lease. He was not appointed to judge between the landlord and the tenant and to determine their respective rights, notwithstanding that his order might affect them. His position was simply that of an administrator in these circumstances, whose duty and functions were to do as public interest might seem to require, and his functions were not judicial in their character.

We agree with the grounds upon which Mr. Justice Roach has based his view that this order is one that cannot be made the subject of these proceedings. For these reasons the appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the applicant, appellant: Mark Rheingold, Toronto.

Solicitors for the landlord, respondent: Parkinson, Gardiner & Willis, Toronto.

Solicitors for the Rentals Administrator, respondent: Mason, Foulds, Davidson & Gale, Toronto.

[HOGG J.]

Re MacKenzie.

Criminal Law — Preventive Jurisdiction of Justices — Apprehended Breach of the Peace—Order to Find Sureties—Common Law Not Superseded by The Criminal Code, R.S.C. 1927, c. 36, s. 748.

Justices of the peace in Canada have jurisdiction, under the common law, to deal with apprehended breaches of the peace, as a branch of "preventive justice", and to require persons whose conduct threatens to cause a breach of the peace to find sureties for their good behaviour. *Rex v. Patterson* (1931), 66 O.L.R. 461, applied. There is nothing in The Criminal Code which excludes this common law power, and s. 748 (which alone deals with apprehended breaches of the peace) is limited in its scope and does not supersede the common law.

Habeas Corpus—Powers of Court—No Review of Magistrate's Findings on Evidence—The Habeas Corpus Act, R.S.O. 1937, c. 129, s. 6.

On a motion, on *habeas corpus*, for the discharge of a person imprisoned under a conviction which is regular on its face, the Court will not re-hear the case, weigh the evidence, or sit in appeal. *Rex v. Farrell* (1907), 15 O.L.R. 100, applied. If there is any evidence at all on which the magistrate could have made his findings, the Court will not interfere with those findings as against evidence or the weight of evidence. *Rex v. Graf* (1909), 19 O.L.R. 238, followed.

A MOTION, on the return of a writ of *habeas corpus* with *certiorari* in aid, for the discharge of a prisoner.

1st June 1945. The motion was heard by HOGG J. in chambers at Toronto.

T. Delany, for the applicant.

C. R. Magone, K.C., for the Attorney-General for Ontario, *contra*.

4th July 1945. HOGG J.:—Pursuant to a writ of *habeas corpus* and a writ of *certiorari* in aid thereof, both issued on the 29th May 1945, this motion is made on behalf of Alexander C. MacKenzie, of the city of Toronto, for an order discharging him from the common gaol of the county of York.

The essential facts with respect to the present application are as follows:—

The information and complaint of one William E. Martindale, a detective of the city of Toronto, taken on the 29th March 1945, charged that the said MacKenzie in the months of February and March 1945, at the village of Swansea and the city of Toronto, in the county of York, did "unlawfully repeatedly call on the telephone Mrs. Martha MacKenzie, Miss Elsie T. Hodgson, and Creed's Furs Limited, thereby causing the said

parties and employees of Creed's Furs Limited, annoyance, loss of sleep, inconvenience and worry, said acts tending towards a breach of the public peace". The information and complaint continues in the following language: "wherefore the complainant desires that the said Alexander MacKenzie should be brought before a court of summary jurisdiction and that an order should be granted against the said Alexander MacKenzie directing him to find one or more sureties who will be answerable for his good behaviour during such period of time as may seem to the Court just, in accordance with the law, contrary to The Common Law of England." It is to be observed that, according to the phraseology of the information and complaint, it is not only the alleged offence that is stated to be contrary to the common law of England but also the order which it is desired the magistrate should make. This is an error which I do not think militates against the validity of the information.

On the 5th April 1945, MacKenzie was convicted upon a plea of not guilty, by Magistrate O. M. Martin, upon the aforesaid charge and it was adjudged that MacKenzie, for his said offence, find two persons to go surety for his good behaviour in the sum of \$1,000 each for a period of three years, and failing to find two persons to go surety for his good behaviour it was adjudged that MacKenzie be imprisoned in the common gaol in and for the county of York for a term of six months.

A warrant of commitment was issued by the said magistrate under which MacKenzie was delivered to the keeper of the common gaol for the county of York for a term of six months in default of finding two persons to go surety for his good behaviour as aforesaid.

By the provisions of s. 6 of The Habeas Corpus Act, R.S.O. 1937, c. 129, it shall be the duty of the Court upon the return to a writ of habeas corpus, where it is alleged that the person is detained by reason of a conviction or order, other than a conviction or order of the Supreme Court or other court of record, upon the return of the writ of *certiorari*, to examine and consider the proceedings had and taken "to ascertain if the proceedings show that the person restrained has been convicted of any offence against the law and that there is any evidence to sustain the conviction, or that upon the evidence the person accused is guilty of an offence against the law and that

the conviction, though irregular, ought to be amended or drawn so as to duly describe the offence of which the person accused is guilty, and in such cases to remand the person detained to custody but otherwise to order his discharge."

It was contended by Mr. Delany on behalf of MacKenzie that the information and complaint and the conviction by the magistrate did not state any offence known to the law as it exists in Canada, in that the charge upon which MacKenzie was convicted, whether or not it would lie in England under the common law, does not lie in the Dominion of Canada.

It was argued by Mr. Delany that The Criminal Code, R.S.C. 1927, c. 36, provides, by ss. 748 and 1058, instances in which a person may be bound over to keep the peace, and that, this subject having been so dealt with by The Criminal Code, the common law is, by implication, repealed. By s. 10 of The Criminal Code the criminal law of England as it existed on the 17th September 1792 is the criminal law of this Province according to and subject to terms and conditions set out in the section.

In *The Union Colliery Company v. The Queen* (1900), 31 S.C.R. 81, 4 C.C.C. 400, Sedgewick J., who delivered the judgment of the majority of the Court, said at p. 87:

"It has never been contended that the Criminal Code of Canada contains the whole of the criminal common law of England in force in Canada. Parliament never intended to repeal the common law, except in so far as the Code either expressly or by implication repeals it. So that if the facts stated in the indictment constitute an indictable offence at common law, and that offence is not dealt with in the Code, then unquestionably an indictment will lie at common law; even if the offence has been dealt with in the Code, but merely by way of statement of what is law, then both are in force."

In *Rex v. Cole* (1902), 3 O.L.R. 389, 5 C.C.C. 330, in a Divisional Court, Boyd C., at p. 394, said:

"The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the latter law: *Rex v. Carlile*, 3 B. & Ald. 161, 106 E.R. 621. But here the offence, as set forth in the recognizance, is not specified in the Code, and the power of the justice may be exercised as at common law in liberating the prisoner into the hands of bailsmen."

In *Rex v. Williams* (1910), 21 O.L.R. 467, 16 C.C.C. 482, in the Court of Appeal, Meredith J.A., in discussing s. 10, said, at p. 469:

"It was suggested that the prisoner might have been liable to prosecution and punishment at 'common law', as well as under the provisions of sec. 370 of the Criminal Code; but how could that be?" He referred to s. 10 of the Code and continued: "Section 370 of the Criminal Code is such an alteration and modification, and the penalties provided for in it take the place of those in force in England at the time mentioned; and so the prisoner is not subject to transportation or any other of the ancient modes of punishment." It was held that the whole subject of larceny was fully covered by the Code by ss. 344 to 398 and that s. 370 was such an alteration and modification of the law in force in England as to take its place.

In *Rex v. Patterson*, 66 O.L.R. 461, 55 C.C.C. 218, [1931] 3 D.L.R. 267, in the Court of Appeal, the defendant was convicted upon a charge of being a member of an unlawful assembly contrary to s. 89 of The Criminal Code. Sentence was suspended on condition that the defendant keep the peace for the term of one year. Middleton J.A. reviewed at some length the common law with respect to unlawful assembly and the right to bind over to keep the peace. He referred to *Field et al. v. The Receiver of Metropolitan Police*, [1907] 2 K.B. 853, and said at p. 469:

" . . . but more important and more to the point is the decision in *Lansbury v. Riley*, [1914] 3 K.B. 229, that to justify binding over to keep the peace it is not necessary to shew that any one was 'put in bodily fear'.

"This power to bind over to keep the peace is described in the *Lansbury* case, [1914] 3 K.B. at p. 237, by Avory J., quoting Fitzgerald J., in *Reg. v. Justices of Queen's County* (1882), 10 L.R. Ir. 294, at p. 301, as 'a branch of preventive justice, in the exercise of which magistrates are invested with large judicial discretionary powers for the maintenance of order and the preservation of the public peace. Whether it existed at common law, or flows from the commission, or has been conferred by statute, it rests on the maxim or principle "*salus populi suprema lex*", in pursuance of which it sometimes happens that individual liberty may be sacrificed or abridged for the public good'."

I think it is to be concluded from this language of Middleton J.A. that he was of the opinion that the common law power,

referred to by Avory J. in the *Lansbury* case as "a branch of preventive justice", to bind over to keep the peace, was the law in Canada and its administration was within the jurisdiction of a magistrate in Canada.

In *Rex v. Halliday*, [1917] A.C. 260, Lord Atkinson said at p. 273:

"Preventive justice, as it is styled, which consists in restraining a man from committing a crime he may commit but has not yet committed, or doing some act injurious to members of the community which he may do but has not yet done, is no new thing in the laws of England."

There are two comparatively recent cases in England in which the question of preventive justice is considered and discussed. In *Rex v. Sandbach; Ex parte Williams*, [1935] 2 K.B. 192, Humphreys J. said at p. 197:

"Blackstone says in terms that a magistrate may properly bind over a person in any case where it is apprehended that it is likely he will commit a breach of the peace or that he will do something against the law."

The judgment in *Thomas v. Sawkins*, [1935] 2 K.B. 249, deals with the same subject and affirms the jurisdiction of the magistrates to require a person to enter into a recognizance for good behaviour.

In *Rex v. Poffenroth*, [1942] 2 W.W.R. 362, 78 C.C.C. 181, a police magistrate in Alberta held that conduct likely to cause a breach of the peace was not an offence specifically dealt with by The Criminal Code, and that the law of England was in force in Canada, under which justices of the peace have jurisdiction to require a person to enter into a recognizance for good behaviour in order to prevent an apprehended breach of the peace.

In the unreported case of *Rex v. Kohen*, Urquhart J. delivered judgment on the 7th May 1943 and held that a magistrate had jurisdiction under the common law to bind a person over to keep the peace.

Nowhere under The Criminal Code except in s. 748(2) is there provision whereby, although no offence has been committed, a person may be bound over to keep the peace, and then it is only where the complainant fears that another person will do himself or his wife or his child some personal injury or will burn or set fire to his property. The Parliament of Canada

has never exercised its legislative power, except as aforesaid, to enact that conduct likely to cause a breach of the peace shall be an offence.

I have come to the conclusion in the present case that the common law, as it existed in England, giving jurisdiction to magistrates to bind over to keep the peace as a branch of preventive justice, referred to by Middleton J.A. in the *Patter-son* case, has not been, either expressly or by implication, repealed by any provision of The Criminal Code, and that it is the law in Canada.

On a motion upon *habeas corpus* for the discharge of a person imprisoned under a conviction which may appear regular on its face, the Court will not re-hear the case or weigh the evidence or sit in appeal: *Rex v. Farrell* (1907), 15 O.L.R. 100, 12 C.C.C. 524. The Court may examine the evidence and proceedings before the magistrate to ascertain if a conviction is justified: *Rex v. Page*, 53 O.L.R. 70, 41 C.C.C. 59, [1923] 3 D.L.R. 854; *Rex v. Gordon*, 54 O.L.R. 355, 42 C.C.C. 26, [1924] 2 D.L.R. 358, but, as was said by Riddell J. in *Rex v. Graf* (1909), 19 O.L.R. 238, at p. 240, 15 C.C.C. 193, " . . . the Court will not, if there be any evidence at all upon which a jury or a Judge might so find, interfere with a finding as against evidence or the weight of evidence."

Although a crime has not been committed, but only acts from which it is apprehended a crime may be committed, and therefore there is no offence in the strict sense of the word, nevertheless I think that the word "offence", as it appears in the formal conviction, may be taken to mean and to refer only to acts or conduct likely to cause a breach of the peace.

In my opinion there is some evidence upon which the magistrate might find that there had been a breach of the common law relating to a breach of the peace, and the magistrate had jurisdiction. I have not the right to review the evidence and the proceedings as on an appeal, and I cannot interfere, although I might hold a contrary opinion, with the magistrate's judgment as against the evidence or the weight of evidence.

The application is dismissed.

Application dismissed.

Solicitor for the applicant: Thomas Delany, Toronto.

[COURT OF APPEAL.]

Re McEwan.

Insurance — Life — Designation of Preferred Beneficiary — Policy Taken Out by Married Man in Favour of "Friend"—Subsequent Divorce of Insured and Marriage with Named Beneficiary—Declaration by Will—The Insurance Act, R.S.O. 1937, c. 256, ss. 151(2), 153, 156, 157, 158.

A married man took out a policy of insurance on his life, naming therein as the beneficiary a woman whom he described as his "friend". Some three years later, the insured divorced his wife and married the beneficiary named in the policy. He later signed a declaration making his insurance moneys payable to his estate, and by clause 3 of his will he directed that his executors should divide the proceeds of the policy by giving 10 per cent. to his former wife, 10 per cent. to his second wife (the named beneficiary) and 80 per cent. equally among his children.

Held, (1) The clause in the will was a valid declaration in favour of the children as to 80 per cent. of the proceeds. *Re MacInnes*, [1934] O.R. 120, 371; [1935] S.C.R. 200, applied; *Re Dunn*, [1934] O.W.N. 95; *Re Mailloux* (1930), 38 O.W.N. 311; *Re Lloyd*, [1941] O.W.N. 429, distinguished (*per curiam*).

(2) The second wife, on her marriage to the insured, became a preferred beneficiary, and was therefore entitled to 20 per cent. of the proceeds of the policy. *Re Wythe* (1927), 60 O.L.R. 323, applied. The declaration, in so far as it purported to give 10 per cent. of the proceeds to the former wife, an ordinary beneficiary, was ineffective (*per HENDERSON and ROACH J.J.A.*; *MCRUER J.A.* dissenting on this point).

AN APPEAL by Dorothy Protheroe McEwan, widow of the deceased, Charles Baskerville McEwan, from an order of Kelly J., [1945] O.W.N. 425, 12 I.L.R. 134, [1945] 3 D.L.R. 211, made on a motion by the executors of the estate for the opinion, advice and direction of the Court. The facts are stated in the reasons for judgment of ROACH J.A.

4th June 1945. The appeal was heard by HENDERSON, ROACH and MCRUER J.J.A.

W. E. Spencer, K.C., for the appellant: The appellant, the named beneficiary in the policy, became a preferred beneficiary upon her marriage to the insured, and the change of designation of beneficiary made by him in 1940 was ineffective; the clause in the will is equally ineffective because of the provisions of s. 156 (1) of The Insurance Act, R.S.O. 1937, c. 256: *Re Dunn*, [1934] O.W.N. 95 at 98; *Re Lloyd*, [1941] O.W.N. 429 at 434, 9 I.L.R. 267, [1942] 1 D.L.R. 662. An appointment before marriage, where the marriage afterwards takes place, is an appointment in favour of a "wife" within the meaning of the Act: *Re Wythe*,

59 O.L.R. 546 at 548, [1926] 4 D.L.R. 1083, affirmed 60 O.L.R. 323, [1927] 2 D.L.R. 1161.

The trial judge was wrong in saying that the decision in *Re Wythe, supra*, was affected by *Re Cadieux* (1929), 37 O.W.N. 184, and that case has no application whatever to the facts of the case at bar. It was decided on two points, the validity of a foreign divorce, and an attempted change of beneficiary by a person other than the insured.

The trial judge erred in holding that the act of the insured in naming the appellant, a "friend", as beneficiary, while he was a married man, was contrary to public policy. Public policy does not prevent a married person from conferring a benefit on a person of the opposite sex.

G. M. Dodman, for the executor, submitted his rights to the Court.

R. D. Steele, for the respondents: When the policy in question was issued the insured was a married man, and the appellant was not his wife or a person within the preferred class. She was therefore then an ordinary beneficiary. She did not, by being named in the policy, acquire a right to become a preferred beneficiary, as it would be contrary to public policy to permit her to acquire the rights of a wife, or a future wife, while the insured's wife was still living: *Sheehan v. Mercantile Trust Co. of Canada Limited* (1920), 46 O.L.R. 581, 52 D.L.R. 538; 16 Halsbury, 2nd ed., 1935, p. 553, para. 816.

When this policy was issued, the insured had a right to change the beneficiary without the consent of the named beneficiary: s. 153 of The Insurance Act. A beneficiary can be designated only in the policy itself or by a declaration under the Act; it cannot be done by a change of circumstances, either alone or combined with an earlier designation in the policy: *Re Cadieux* (1929), 37 O.W.N. 184. The statute distinctly provides for only two ways of designating a preferred beneficiary, and ss. 153(1) and 156(1) are the only sections dealing with the matter.

The appellant cannot claim to have been designated as a future wife, and thus a preferred beneficiary, within the provisions of s. 158(1), as she is designated by name, and in any event a married man cannot have a "future wife".

W. E. Spencer, K.C., in reply.

22nd June 1945. HENDERSON J.A.:—I have had the privilege of reading the opinion of my brother Roach and the opinion of my brother McRuer.

I agree with the conclusion of my brother Roach that upon her marriage to the deceased Dorothy Protheroe McEwan became a preferred beneficiary, and consequently I agree with his conclusion that she is entitled to twenty per cent. of the proceeds of the policy in question.

I also agree with my brother Roach and my brother McRuer that the children or grandchildren, as the case may be, are entitled to the payment of eighty per cent. of the policy in question.

I agree with the disposition of costs made by my brother Roach.

ROACH J.A.:—This is an appeal from the judgment of Kelly J., dated the 3rd day of May 1945, declaring that the appellant, one Dorothy Protheroe McEwan, never became a preferred beneficiary under a policy of life insurance issued by the London Life Insurance Company on the life of the deceased, and that a designation subsequently made by him in his will was effective to make the proceeds of the said policy payable to his estate.

The facts are not in dispute, and are as follows:

The policy in question was issued under date 2nd September 1935, and the beneficiary named therein was Dorothy Protheroe, described as "friend". At the date of the issue of the said policy McEwan was a married man and his wife's name was Mary L. McEwan. In 1938 he instituted divorce proceedings against his wife and judgment absolute in that action was issued on December 20th 1938. On 6th May 1939 McEwan married Dorothy Protheroe. Several months later they separated.

By a declaration dated 22nd June 1940, McEwan purported to make the proceeds of the said policy payable on his death to his estate. Dorothy Protheroe did not consent to this change. On 24th January 1943 McEwan made his will. Para. 3 thereof is in part as follows: "The Proceeds from my Life Insurance Policies, my Bonds, (other than my War Savings Certificates) any cash I may have on hand or in any Bank, shall be divided by my Executor in the following manner, that is to say: Ten per centum of such proceeds shall go to my former wife, Mary L. McEwan; Ten per centum of same shall go to my present wife,

Dorothy J. McEwan; The remaining Eighty per centum of said proceeds shall be divided equally among my children", naming them, and providing for distribution in the event of Dorothy Protheroe or Mary L. McEwan or any of his children predeceasing him.

McEwan died on or about 2nd October 1943. Probate of his will was granted to the executor, and subsequently the insurance company, with the consent of all persons concerned, paid the proceeds of this particular policy, and two other small policies, to the executor. The executor then applied to the Court for directions as to the person or persons to whom the proceeds of the said policies should be paid.

The appellant contended that having been named as the beneficiary in the policy, and having subsequently become the wife of the insured, she became a preferred beneficiary, and that neither the declaration dated 22nd June 1940, nor the provision in the will, was effective as against her, and that she was therefore entitled to payment of the total amount of the policy.

The matter falls to be determined by a consideration of certain sections of The Insurance Act, R.S.O. 1937, c. 256. Section 151(2) names by description those who fall within the class of preferred beneficiaries, and, of course, included in the class are a "wife" and "children" and "grandchildren".

Section 153 gives power to the insured to designate the beneficiary by the contract or by a declaration, and from time to time by any declaration to alter or revoke any prior designation, including a power to divert the insurance money to his estate, but all these powers are subject to the provisions of the statute relating to preferred beneficiaries.

Then by s. 156(1) it is provided that "Where the insured, in pursuance of the provisions of section 153, designates as beneficiary or beneficiaries, a member or members of the class of preferred beneficiaries, a trust is created in favour of the designated beneficiary or beneficiaries, and the insurance money, or such part thereof as is or has been apportioned to a preferred beneficiary, shall not, except as otherwise provided in this Act, be subject to the control of the insured, or of his creditors, or form part of the estate of the insured."

Then by s. 157 it is provided that where a preferred beneficiary or beneficiaries have been designated, the insured, not-

withstanding such designation may, subsequently, restrict, limit, extend or transfer the benefits of the policy to any one or more of the class of preferred beneficiaries to the exclusion of any or all others of the class.

Section 158 provides for the case where the beneficiary is a future wife, although not designated by name. That section can have no applicability here, because the appellant is designated by name as the beneficiary under the policy.

The case of *Re Wythe*, 60 O.L.R. 323, [1927] 2 D.L.R. 1161, is decisive of the point in issue here. In that case the insured, being an unmarried man, apparently in contemplation of marriage, by a declaration which was held to be sufficient under the statute, made the policy payable to the woman whom he subsequently married. It was held by this Court (Ferguson and Magee J.J.A. dissenting) that the insured having married the beneficiary, she became a preferred beneficiary.

There, the beneficiary was designated by declaration; here, the beneficiary was designated by the contract. Of course, either method suffices under the statute: s. 153. There, the insured was unmarried, and designated the beneficiary apparently in contemplation of his marriage to her. Here, the insured had a wife living at the time the policy was issued, and cannot be regarded as having designated Miss Protheroe as beneficiary in contemplation of his marriage to her. This distinction does not take this case outside the decision in *Re Wythe*. The result in law does not depend upon the presence or absence of any agreement or intention to marry. The subsequent marriage is the only deciding factor. Hodgins J.A., in the *Wythe* case, at p. 329, put it thus:

“When such person becomes by virtue of an Act which gives her, though the same individual, yet an added status, and one recognised from earliest times by statute as a preferred beneficiary, it does not seem difficult to hold that her rights must be determined having regard to the change made by marriage.”

It is true that since the decision in the *Wythe* case there have been some changes in the statute. I do not think it necessary to refer to them. They do not, in my opinion, alter the result.

Now, it was urged by Mr. Steele that in order for the appellant to acquire a status as a preferred beneficiary under the policy, it would be necessary for the insured, subsequent to his

marriage, to make some sort of declaration within the statute naming her as a *preferred* beneficiary. I am at a loss to know what the insured would declare in such a suggested declaration. It would only be a declaration that he wished the policy to be payable to his wife. It was already payable to his wife, although designated by her name prior to her marriage to him, and could only be the same designation by declaration as the one made by him when the policy was originally applied for.

I do not think it is stretching or distorting s. 156 of the statute to hold that, if the beneficiary who has been designated by the insured either in the policy originally or by a subsequent declaration subsequently becomes a member of the class of preferred beneficiaries, then upon her attaining that status the trust created by s. 156 is created.

For the reasons aforesaid, in my judgment, the appellant, upon her marriage to the insured, became a preferred beneficiary under the policy, and thereafter the control which the insured was permitted to exercise over the insurance money was that permitted by s. 157.

The declaration made by the insured in June 1940 was ineffective to change the beneficiary from the appellant to his estate because it contravened s. 157 of the statute. The declaration contained in the will of the deceased, which I have earlier quoted, does not make the proceeds of the policy payable to his estate. It is a valid declaration under The Insurance Act in so far as it makes 80 per cent. of the policy payable to the children or grandchildren of the insured: they are preferred beneficiaries under s. 151(2). It is ineffective in so far as it purports to make 10 per cent. thereof payable to the former wife: she is only an ordinary beneficiary.

The result is that the appellant is entitled to 20 per cent. of the proceeds of the policy and the children or the grandchildren, as the case may be, are entitled to the balance.

The appeal should, therefore, be allowed and the judgment of the learned trial judge should be varied accordingly.

As to the costs, the executor should have his costs of the motion before Kelly J., and of this appeal, as between solicitor and client, out of the proceeds of the policy. The other parties should have their costs of the motion out of those proceeds but they should each bear their own costs of this appeal.

MCRUER J.A. (*dissenting in part*):—The facts necessary to be considered in arriving at a decision in this case are fully set out in the judgment of my brother Roach. Two questions of law arise:

(1) Was a trust created in favour of Dorothy Protheroe (later Dorothy P. McEwan) under the provisions of The Insurance Act, R.S.O. 1937, c. 256, s. 156, restricting the right of the testator to dispose of the proceeds of the insurance policy without the class of preferred beneficiaries?

(2) In case the answer to the first question is “Yes”, a second question arises: Should clause 3 of the testator’s will be construed as a declaration within the meaning of the provisions of The Insurance Act in favour of persons named in the will who come within the class of preferred beneficiaries?

Apart from the special provisions of ss. 156, 157 and 158 of the statute, the assured was at liberty to designate a beneficiary in the contract and subsequently, by declaration made either by will or otherwise, to alter or revoke the designation as he might desire.

At the time the contract was entered into and Dorothy Protheroe was designated as a beneficiary therein, there could be no intention on the part of the assured to confer upon her the special rights of a future wife and a preferred beneficiary. The assured at that time was a married man, and any contract entered into with such intention would be void as against public policy. It must, therefore, be taken that under the contract when written, the beneficiary was intended to have merely the rights of an ordinary beneficiary. If she subsequently acquired the superior rights of a preferred beneficiary, she must have acquired those rights by virtue of the provisions of the statute. No subsequent declaration in her favour was made by the testator outside of the provisions in his will.

Sections 156 to 158 of the Act have been the subject of consideration in the courts on many occasions, but the precise problem that arises in the case in appeal has not heretofore been decided.

When the assured under a policy of insurance has designated a beneficiary who is a member of the class of preferred beneficiaries, a trust is created in favour of the designated beneficiary (s. 156). The effect of this provision is to create in the desig-

nated preferred beneficiary a property interest in the policy even during the lifetime of the assured. "The moneys payable in respect of the policy are trust funds, as to which they are beneficiaries, and their nomination as beneficiaries is in effect an assignment of the policy to them, subject to the right of the assured to change the beneficiaries in the cases permitted by the Act, and to their surviving the assured": *per* Falconbridge C.J. in *Re Mutual Life Association; Wellington's Claim* (1909), 18 O.L.R. 411 at 414.

In *Doull v. Doelle* (1905), 10 O.L.R. 411, it was held that the effect of The Insurance Act was to create a statutory trust of the moneys payable by the policy in favour of the wife (the beneficiary), without restraint on anticipation, but subject to be defeated upon the happening of either of two contingencies, *viz.*, (1) the wife predeceasing the husband; (2) the revocation of her appointment as beneficiary and an apportionment to any of the preferred class. It was also held that the policy and its proceeds were, during the lifetime of the deceased, separate estate within the meaning of The Married Women's Property Act, R.S.O. 1897, c. 163, the effect of the statute being to make a policy of insurance and the proceeds thereof "property belonging to the wife during coverture".

The special property interest that is conferred on a preferred beneficiary is purely statutory, and it arises *at the time* the contract is entered into, or the declaration is made. If therefore it is not created at the time the contract is entered into, or by subsequent declaration, by what authority can it arise on the divorce of the assured and his remarriage to the beneficiary? The answer to this question, if one there is, must be found in the provisions of the statute which give power to confer on a preferred beneficiary this particular property interest.

Under s. 156, in order to create the trust, there must be a designation, made pursuant to the provisions of s. 153, of a beneficiary who is a member of the class of preferred beneficiaries. No other method of creating the trust is laid down except as provided in s. 158, with which I shall deal later.

In s. 153, provision is made for designating the beneficiary by the contract or by subsequent declaration or by will. At no time did the assured designate, by the contract, subsequent declaration, or will, a member of the class of preferred beneficiaries

other than by the provisions of the last will and testament before the Court, which will be discussed in dealing with question no. 2. The trust contemplated by the statute is created on the designation in writing of a person who has, at that time, the capacity to receive the property interest in the policy. There is no provision that one who is subsequently raised to the status of a preferred beneficiary should acquire that property interest. Outside of an express statutory provision I fail to see how a trust that did not exist before the marriage of the assured and the beneficiary might be said to be created by the marriage, unless there may be implied an intention to create the trust at the time the document from which it stems was executed.

Such an intention is contemplated, and provided for, where the contract or declaration comes within the terms of s. 158. The provisions of this section may be paraphrased as follows: "Where by the policy . . . the insurance money . . . is made payable to . . . the future wife of the person whose life is covered. . . . the word 'wife' means the wife living at the maturity of the contract, provided the beneficiary is not designated by name." The effect of this section is to make it lawful for an assured to take out a policy of insurance to protect whoever (without naming her) may be his lawful wife at the date of his death. This section, read with s. 156, would be effective to create in favour of the wife, on marriage to the assured, the trust referred to in s. 156. It is, however, quite a different matter to extend by implication the same statutory benefits to an ordinary beneficiary in whose favour there is no similar provision, and who could not, lawfully, have been intended to be the recipient of such a benefit when the contract was entered into.

Re Wythe, 60 O.L.R. 323, [1927] 2 D.L.R. 1161, is relied on by counsel for the widow as conclusive. The decision in that case must be carefully read in the light of the express provisions of The Insurance Act in force at the time the contract then under consideration was written. Two benefit certificates were in question, one dated 3rd December 1921 payable to the mother of the assured, and the other dated 21st April 1921, payable to the father of the assured. On 24th July 1924 the assured executed a declaration in the following words: "This is to certify that I, P. T. H. Wythe, being of sound mind, do leave one-half of my estate to Miss Kathleen Hosking, including insurance." Kath-

leen Hosking is referred to in the judgments throughout as the assured's "intended wife". On 5th September 1925, Kathleen Hosking and the assured were married. These dates are important in interpreting the effect of the judgments. When the contract was entered into, subss. 5 and 6 of s. 178 of The Ontario Insurance Act, R.S.O. 1914, c. 183, were in force. These provisions do not appear in the 1924 Act, which came into force on the 1st January 1926, when s. 158, as it now is, was incorporated in the statute. The declaration was in the form of a will, but was not properly witnessed. It purported to divert the benefits under the policy from the mother and father of the assured. Up to 1st January 1925 a mother was a preferred beneficiary, but a father was not. After that date both were in the preferred class.

At p. 327, Hodgins J.A. points out that the rights of the mother and the future wife were governed by R.S.O. 1914, c. 183, until the 1st January 1925. Subss. 5 and 6 of s. 178 of the 1914 Act were as follows:

"(5) Where an unmarried man or a widower effects the contract or declares it to be for the benefit of his future wife, or of his future wife and children or of his children, but at maturity of the contract the assured is still unmarried, or is a widower without issue, the insurance money shall form part of his estate.

"(6) Where an unmarried man or a widower effects or declares the contract to be for the benefit of his future wife, or future wife and children, and the intended wife is designated by name or is otherwise clearly ascertained in the contract, but the intended marriage does not take place, all questions arising on such contract shall be determined as in the case of a beneficiary not belonging to the preferred class."

The learned Justice in Appeal goes on to point out what the rights of the parties were at the time the 1924 Act came into force, and deals with those rights as they were affected by the 1924 Act. At p. 328, he concludes:

"I see no good reason, *having in view the provisions of the Ontario Insurance Act, as found in R.S.O. 1914, ch. 183, in force when the declaration was made* [the italics are mine], and finding no contrary provision in the new Act, why a person designated as a beneficiary should not, when she afterwards becomes the wife of the insured, be considered as thereafter within the preferred class and entitled to the insurance moneys when

the time arrives at which by the declaration, they are to become hers. At the maturity of the policy she is a wife, and the statute describes a wife as a preferred beneficiary. I think the fact of her then status should be the controlling factor in a case where no statutory provision prevents the Court from so deciding."

It will be observed that in the case that was under consideration the assured had in contemplation an intended wife at the time the declaration was made. The provisions of subs. 6 of s. 178 of the 1914 statute, providing that an assured might make a valid declaration in favour of an intended wife by name, and making provision that no rights of a preferred beneficiary would be conferred unless the marriage took place, quite justify the opinion expressed by Hodgins J.A. at p. 327:

"Under subsec. 6, where an intended wife is mentioned by name, as here, and the marriage does not take place, the intended wife is treated as an ordinary beneficiary. *But this subsection carries with it* [the italics are mine], as it appears to me, a strong implication that, if the marriage does take place, the person named as the intended wife, having acquired wifely status, should be treated as a preferred beneficiary." The decision of Hodgins J.A. appears to be founded on this implication, which arises from the wording of the statute at the time the declaration was made.

Masten J.A., with whom Smith J.A. agreed, bases his judgment on the nature of the declaration. He states that it was an attempt to exercise a power of appointment effective at the time to displace the *pro tanto* interest of the father, who was not at that date a preferred beneficiary under the statute then in force, but ineffective when it was signed to displace the claim of the mother, who was a preferred beneficiary. He says: "... such attempted exercise of the power was never cancelled or revoked either by the lapse of time or by circumstances, and that it may be characterized as a continuing attempt to exercise the power conferred by the statute; also that upon the marriage of Wythe to the respondent it became possible in law, and the attempted appointment, which had theretofore been ineffective, then became an effective exercise of the power." (The italics are mine).

It will be observed that this reasoning is based on an intention existing at the time the declaration was made to confer on the beneficiary the rights of a preferred beneficiary, and it was this

continuing intention which made the ineffective document an effective one at the time of the marriage. This reasoning has no application to the case in appeal. There was not, and could not have been, an attempt to exercise such a power of appointment at the time the policy was written. Obviously, any document signed with such an end in view would be void as against public policy, and no rights could flow from it.

The case in appeal also differs from the *Wythe* case in that here the beneficiary was named in the contract, and not by declaration. In the *Wythe* case, Ferguson J.A., dissenting, with whom Magee J.A. agreed, expresses the view that the declaration was testamentary in character, although not in form, and spoke from the date of the death of the assured. The beneficiary had, at the effective date of the instrument, acquired the status of a preferred beneficiary. With respect, I do not think the decision in the *Wythe* case applies to the case in appeal. I think it is at the best a decision on the special facts that were before the Court. A close study of the majority judgments clearly indicates that the judgment is founded on an implication that there was a valid intention in the assured at the time the declaration was made, to confer on the beneficiary all the property interest of a preferred beneficiary in the policy contingent on their marriage, all of which was recognized by the statute in force at the time the declaration was made, and none of which could be in contemplation in the case in appeal. I would, therefore, hold that a trust under the provisions of s. 156 of The Insurance Act was, at no time, created in favour of Dorothy Protheroe.

I do not think any general principle is laid down in the judgment of Hodgins J.A. that compels me to hold that a named ordinary beneficiary, who, at the time of the contract, is not and could not be intended to acquire the rights of a preferred beneficiary, acquires those rights upon subsequent marriage with the assured. If such a principle is to be gathered from the language of the learned Justice in Appeal, it is not concurred in by a majority of the members of the Court.

I have come to the conclusion that if I am wrong in my answer to the first question, the last will of the deceased would operate in that case as a declaration under The Insurance Act in favour of those named therein who are within the preferred class. Clause 3 reads:

"3. The Proceeds from my Life Insurance Policies, my Bonds, (other than my War Savings Certificates) any cash I may have on hand or in any Bank, shall be divided by my Executor in the following manner, that is to say: Ten per centum of such proceeds shall go to my former wife, Mary L. McEwan: Ten per centum of same shall go to my present wife, Dorothy J. McEwan; The remaining Eighty per centum of said proceeds shall be divided equally among my children, Anne, Marjorie, Gordon and Jack, share and share alike, and in event any of my said children should predecease me, then the share of the said deceased child shall go to his children if any. If any of my said children should predecease me without issue, then the share of the said deceased child or children shall be divided equally among my remaining children. If my present wife, Dorothy J. McEwan, should predecease me, then I direct my Executor hereinafter named, to pay her above mentioned ten per centum share to her daughter Anne Protheroe, providing her said daughter Anne has not, at the time of my decease, attained the full age of Eighteen years. If, at the time of my decease, the said Anne Protheroe has attained the full age of Eighteen years, then the said above mentioned ten per centum share shall be divided equally among my children Anne, Marjorie, Gordon and Jack, share and share alike."

It will be observed that the proceeds of the life insurance policies are the subject of specific disposition and are in no way made part of the estate of the deceased. The beneficiaries under clause 3 are all within the preferred class mentioned in s. 151(2) of the Act, except Mary L. McEwan, the former wife.

An insured may, by contract, subsequent declaration or will "direct when and to what extent a beneficiary shall receive the benefits secured by the insurance on his life, and he can postpone their receipt for any period of time, or give such right in and to the money or part of it as he may desire . . . the benefits may be transferred 'wholly or partly to one or more for life or any other term or subject to any limitation or contingency with remainder to any other or others of the class': *per* Hodgins J.A. in *Re Wythe*, *supra*, at p. 326. See also The Insurance Act, ss. 153 and 157.

If the words used in the disposition in the *Wythe* case, "do leave one-half of my estate to Miss Kathleen Hosking, including insurance" were sufficient to operate as a good declaration in

favour of a preferred beneficiary, I can see no reason why the words of the will here in question are not likewise a sufficient declaration in favour of the children and grandchildren referred to therein to the extent of eighty per cent. of the insurance.

In a not dissimilar case, *Re MacInnes*, [1934] O.R. 120, [1934] 1 D.L.R. 733, affirmed with variations [1934] O.R. 371, 1 I.L.R. 236, [1934] 3 D.L.R. 302, which was affirmed [1935] S.C.R. 200, 2 I.L.R. 14, [1935] 1 D.L.R. 401, Mr. Justice Garrow held that the subsequent designation on a policy that was payable to the wife of the deceased, in so far as it purported to be a designation in favour of a sister, was void, but that in so far as it gave benefits to the testator's mother it was valid as against the claim of the widow.

The case in appeal is a very different case from *Re Dunn*, [1934] O.W.N. 95; *Re Mailloux* (1930), 38 O.W.N. 311, or *Re Lloyd*, [1941] O.W.N. 429, 9 I.L.R. 267, [1942] 1 D.L.R. 662. In all those cases the words that were used were such as to divert the proceeds of the policy from a preferred beneficiary to the estate of the assured, and thus make the insurance moneys liable for the debts of the deceased. No such words are contained in the will here under consideration. I can see no reason why the intention of the testator should not be carried out to the extent that eighty per cent. of the proceeds of the life insurance policy should be divided equally among the testator's children Anne, Marjorie, Gordon and Jack, share and share alike. It does not appear that any of these children have predeceased the testator, but if such were the case the gift over to grandchildren would still be within the preferred class. The gifts over of the interest of Dorothy P. McEwan, contained in the last two sentences of clause 3, do not require consideration as they were contingent on an event that did not occur.

I think, therefore, it is correct to conclude that even if Dorothy P. McEwan did acquire rights under the policy as a preferred beneficiary, a valid declaration as to 80 per cent. of the insurance was made in favour of the children of the deceased who were named in clause 3 of the will, and that the declaration in favour of the first wife is invalid, and should be treated in the same manner as was the invalid declaration in *Re MacInnes*, *supra*.

On the second hypothesis the proceeds of the insurance policy should be divided as follows: 20 per cent. to Dorothy P. McEwan and 80 per cent. divided equally between the children of the deceased, as named in clause 3 of the will.

Having decided the first point against the widow, I would allow the appeal in part, and direct that the formal order be amended by deleting clauses 2, 3 and 4 and substituting therefor clauses providing that:

(1) Dorothy P. McEwan, by virtue of the declaration in the will, is entitled to a 10 per cent. interest as a preferred beneficiary in the policy of insurance;

(2) children of the deceased mentioned in clause 3 of the will share equally an 80 per cent. interest in the policy of insurance in question;

(3) Mary L. McEwan is entitled to a 10 per cent. interest in the policy of insurance.

The costs of all parties on the motion before Kelly J. should be paid out of the insurance fund, the costs of the executors to be taxed on a solicitor and client basis. The widow and the children should each bear their own costs on the appeal, and the executors should be paid their costs out of the general funds of the estate on a solicitor and client basis.

Appeal allowed in part, MCRUER J.A. dissenting in part.

Solicitor for the executors: G. M. Dodman, Chatham.

Solicitors for the widow, appellant: Spencer & Braund, London.

Solicitor for the children, respondents: Ralph D. Steele, Chatham.

[HOPE J.]

The Metropolitan Stores Limited v. The City of Hamilton.

Municipal Corporations—Powers—Closing Streets and Lanes—Bona fides—Test of Validity—Whether By-law Passed in General Interest or that of Particular Person—The Municipal Act, R.S.O. 1937, c. 266, s. 495(b), (c).

Where a by-law closing part of a lane is attacked on the ground that it has been passed, not in the public interest, but to subserve private interests of particular persons, it is not conclusive that the activating force has been a private individual who will benefit particularly from the proposed closing, or even that that individual has agreed with the municipality to indemnify it and save it harmless against any costs and claims which may flow from the passing of the by-law. The onus is on a plaintiff in such a case to show that the by-law was not passed in good faith, and the courts will always recognize that municipal councils, familiar with local conditions, are in the best position to determine whether or not such a matter is in the public interest. *Kuchma v. The Rural Municipality of Tache*, [1945] S.C.R. 234; *United Buildings Corporation, Limited v. The City of Vancouver*, [1915] A.C. 345, applied; *Wallace v. Town of Dauphin* (1932), 40 Man. R. 474, distinguished; other authorities referred to.

AN ACTION for a declaration that a by-law passed by the defendant was illegal and void, and for other relief. The facts, and the relief sought, are fully stated in the reasons for judgment.

31st May and 1st and 6th June 1945. The action was tried by HOPE J. without a jury at Hamilton.

J. R. Cartwright, K.C., and *E. H. Slater*, for the plaintiff.

G. W. Mason, K.C., and *A. J. Polson, K.C.*, for the defendant.

26th June 1945. HOPE J.:—This action is brought by the plaintiff (a) for a declaration that the defendant exceeded its statutory powers in enacting, on the 30th May 1944, a certain by-law, no. 5515, which closed part of a certain alleyway or lane in the defendant municipality; (b) for a declaration that the by-law is illegal and void and an order quashing the same; (c) for a declaration that the plaintiff's right to make legal use of the lands forming that part of the laneway proposed to be closed has not been determined or limited by the said by-law, and (d) for an injunction restraining the defendant from closing up the said laneway in whole or in part, and from conveying any part of the same to the Kresge company, a mercantile organization carrying on business in the city of Hamilton.

The plaintiff is an incorporated company having its chief place of business at London, Ontario, and operating a chain of

variety stores in many parts of the country. The plaintiff claims to be a direct business competitor of the S. S. Kresge Company Limited amongst others.

In November 1940, the plaintiff purchased a block of land having a frontage of 72 feet 4 inches on King Street in the city of Hamilton and extending northerly approximately 94 feet to a 12-foot laneway. In so doing it was the intention of the plaintiff to build, as soon as conditions permitted, a large building for business purposes. The plaintiff apparently was influenced in purchasing this particular property because of its proximity to its competitor, the Kresge company, which owned a property in the same block a short distance to the west, having a frontage of 89 feet 3 inches on King Street and extending from King Street on the easterly side of Hughson Street to the said laneway. Both of these properties are in what is regarded in the city of Hamilton as "Block No. 2" of the city, that is the block which is the second most desirable location for mercantile businesses in the city. This Block No. 2 is bounded on the south by King Street, the chief thoroughfare of the city, on its north by King William Street, on its east by John Street and on its west by Hughson Street, the latter being a one-way street. The block is bisected from John Street to Hughson Street by an alleyway 12 feet in width.

Immediately to the north of the said alleyway, and occupying approximately the westerly two-thirds of the land to the north of the alleyway, is a property owned by the Wood estate, which has on its north-westerly corner an old warehouse, but the main portion of this Wood estate property is used as a car-parking lot. The Wood estate property had, for twenty years or more, been in this condition, and had been on the market.

In the early part of 1944 the Kresge company, at the instigation of Mr. DeMara, a very active and prominent real estate agent, proposed buying the Wood estate property with the object of erecting a larger building for its mercantile purposes, extending from King Street along the east side of Hughson Street to King William Street. This project would only be possible if the municipal council of the defendant corporation could be induced to close the westerly 103 feet 7 inches of the aforesaid alleyway. The advantage to the Kresge company of having the alleyway closed and thus being able to construct a continuous building for

the entire length of the block on Hughson Street, is all too obvious.

Mr. DeMara was employed by them to approach the city council, as was also their solicitor Mr. Langs, who was present with the defendant's counsel and solicitor during the trial.

The solicitor for the Wood estate co-operated with Mr. Langs in requesting by letter the council of the defendant corporation to close the portion of the alleyway referred to.

In advancing the proposal, the Kresge company offered to purchase the portion of the alleyway proposed to be closed in exchange for a portion of the lands being purchased by the Kresge company from the Wood estate to enable the alleyway to be diverted northerly to King William Street, and also to widen it from 12 to 16 feet.

The original proposal was criticized, and in its final form the Kresge company offered to the City a 20-foot laneway northerly from the present alleyway to King William Street, and an 8-foot strip of land parallel and contiguous to the alleyway immediately to the south of the easterly 108 feet 9 inches of the Wood estate property, and also a triangular piece of land at the junction of the old alleyway and the proposed northerly extension of it by way of diversion, to enable vehicles to negotiate the turn more readily.

The situation is graphically set out in the plan filed as Ex. 1, whereon the portion of the alleyway proposed to be closed is shown in blue, the remaining portion of the old alleyway in red, and the parcel proposed to be conveyed to the City, for the widening and diversion of the alleyway to King William Street, in orange.

Under an agreement, Ex. 2, dated the 20th January 1944, the executors of the Wood estate, as vendors, agreed with the Kresge company as purchaser, for the sale of the property above mentioned. This agreement was, *inter alia*, upon the terms and conditions:

- (1) that the said alleyway is to be closed in part;
- (2) that the purchaser is forthwith to take such steps as it may be advised to have the said portion of the said alleyway so closed and that the vendor is to co-operate in every way to bring about the closing of the said portion;
- (3) that if the said alleyway is not closed on a basis satisfactory to the purchaser, on or before the 30th April 1944, the agreement is to be null and void.

By a further agreement, Ex. 3, dated the 21st April 1944, the term of the original agreement was extended to the 31st May 1944. In such extension agreement there appears a recital that "it will require further time to complete the legal closing and opening of the said alleys pursuant to The Municipal Act, R.S.O. 1937, chapter 266."

That the council of the defendant corporation had authority to pass a by-law such as the one in question is, I think, quite clear from the provisions of s. 495 of The Municipal Act, which empowers the council of a municipality to pass by-laws "(b) for widening, altering or diverting any highway or part of a highway; (c) for stopping up any highway or part of a highway and for leasing or selling the soil and freehold of a stopped up highway or part of a highway."

The normal formalities required by law as precedent to the passing of a by-law were complied with and are not questioned by the plaintiff.

When the matter originally came before the works committee of the municipal council, approval of the proposed scheme was refused. It was quite apparent, from the evidence, that active solicitation on behalf of the Kresge company was pursued amongst the members of the council in favour of the proposed scheme. The matter was again dealt with by the works committee of council, and this time was reported upon favourably, subject to the addition of certain protective conditions in the interest of the City. The matter was then dealt with by the board of control and in due course came before the city council, on 30th May, after notice of the proposed by-law had been published as required by the statute. In the meantime one must gather from the evidence that very extensive and active lobbying had been pursued both on behalf of the Kresge company, particularly through its solicitor and Mr. DeMara, and on behalf of the plaintiff by its solicitor and the agents for the solicitor.

At the meeting of the municipal council on 30th May, the by-law was given its first, second and third readings. To enable the third reading to be given, two rules governing the proceedings of council were suspended, namely, Rule 2, the suspension of which permitted the council to continue its session after 11 o'clock in the evening, and Rule 27, the suspension of which

permitted a third reading of the by-law at the same sittings of the council at which the by-law had been passed the first and second times. This latter, according to the evidence of the city clerk, was an unusual occurrence, Rule 27 only having been so suspended two or three times previously in thirteen years or more of his attendance on the city council. The suspension of this rule was cited by the counsel for the plaintiff as evidence of undue haste on the part of the council, and as having some significance of partiality towards the Kresge company, in view of the fact that the option of purchase from the Wood estate expired on 31st May.

While it was brought out in evidence that some members of council were aware that the option would shortly expire, there was no evidence bringing to the door of any councillor the knowledge that it expired the following day, and there was no evidence that the close proximity of the expiry date of the option had in any way influenced the council in expediting the third reading of the by-law on the evening of 30th May by the suspension of Rule 27.

The main ground on which the plaintiff attacked the validity of the by-law was that it had been passed not in the public interest, but to subserve the private interest of the Kresge company and the Wood estate.

It was quite apparent from the evidence that the alleyway had continued in its present condition as a public lane many many years, in fact beyond the memory of any of the parties now active, and also that no suggestion had been made in all of those years to change it as to either width, direction or location in the interest of the public. It was also quite apparent, and in fact admitted by the defendant's counsel, that the proceedings to close part of the lane, and divert it, were instigated solely by the Kresge company with the active support of the Wood estate, the vendors of the property.

It may also be taken from the evidence that the scheme was originated, developed and advocated by Mr. DeMara, who was himself interested as agent in the sale of the Wood property. The consents of all owners, mortgagees and tenants of property abutting on the lane both to the north and to the south, save for the plaintiff company, were obtained. It is equally clear that such consents were obtained on the active solicitation of DeMara.

It was admitted in evidence by Mr. Waller, general manager and vice-president of the plaintiff corporation, that the proposed change in the alleyway was not a detriment to the plaintiff's property, although Mr. Waller could not see that the proposed change would be of any benefit to the property, and he freely stated that his grievance, and I therefore take it to be the grievance of the plaintiff, was wholly that by the closing of part of the lane as proposed, a competitor of the plaintiff would be permitted to enlarge the competitor's store premises, thus giving what was considered by Mr. Waller a business advantage over the plaintiff.

I am of the opinion that in stating that the change would not be a detriment to the plaintiff, Mr. Waller was only stating that the alteration in the lane *qua* lane would not be a detriment.

On the evidence I feel that full opportunity was given to the plaintiff, through its solicitors and agents, to voice its objections to the municipal council and the subsidiary committees thereof, despite the suggestion by some of the councillors that the plaintiff's spokesman was given scant courtesy, and I am also of the opinion that it was brought to the attention of the council that if the proposed by-law to close the lane should be permitted to stand, the plaintiff would abandon its proposed building project, and that the city would therefore lose that important and increased assessment, even if it might gain the important and increased assessment due to the enlargement of the Kresge premises.

There has been a long succession of cases both in this Province and in other Provinces of the Dominion, dealing with the problem here present, and many decisions of the Court have both upheld and quashed the by-laws in question, depending upon the circumstances and facts in each case. The principles upon which those facts must be viewed have been set out most fully by Masten J.A., in *Re Howard and City of Toronto*; *Re Sweet and City of Toronto*, 61 O.L.R. 563 at 574-5, [1928] 1 D.L.R. 952. But the law applicable has been more recently repeated by the Supreme Court of Canada in the case of *Kuchma v. The Rural Municipality of Tache*, [1945] S.C.R. 234, [1945] 2 D.L.R. 13, in which the following pertinent statements are made by Estey J., whose judgment was concurred in by the Chief Justice and Hudson and Taschereau JJ. Estey J., at p. 239, states:

"It has always been the function of the courts to pass upon questions of jurisdiction, good faith and public interest, and legislatures pass this and similar legislation in the expectation that the courts will continue to pass upon and determine such questions." And again, at the same page: "A by-law which has not been passed by a municipal corporation in good faith and in the public interest, when passed is a nullity. . . . *Canada Atlantic Railway Co. v. Corporation of the Township of Cambridge* (1888), 15 S.C.R. 219.

"The appellant here contends that the 'by-law is not in the public interest' and further, that the council acted 'in bad faith and through fraud and partiality'. The authorities are clear that the onus of proving these allegations rests upon the applicant. They are equally clear that if the applicant succeeds in proving these allegations, the by-law is invalid." Again, at p. 243, quoting from the same judgment:

"Upon the question of public interest, courts have recognized that the municipal council, familiar with local conditions, is in the best position of all parties to determine what is or is not in the public interest and have refused to interfere with its decision unless good and sufficient reason be established." His Lordship cites as authority for this proposition the following cases: *Jones v. Township of Tuckersmith* (1915), 33 O.L.R. 634, 23 D.L.R. 569; *In re Inglis and The City of Toronto* (1905), 9 O.L.R. 562; *Re Mills and City of Hamilton* (1907), 9 O.W.R. 731; *Hurst v. Township of Mersea* (1931), O.R. 290, [1931] 3 D.L.R. 355. Again from the same judgment at p. 244 I quote:

"Changes with respect to highways invariably assist some more than others, and often some are adversely affected. The mere fact that it benefits some and adversely affects others does not determine the question of public interest. All of the circumstances must be surveyed."

The plaintiff's counsel placed great reliance upon the judgment of Dysart J. in *Wallace v. Town of Dauphin*, 40 Man. R. 474 at 480, [1932] 2 W.W.R. 405, quoting in particular from p. 411:

"In testing whether a by-law is passed in the public or private interest, the primary moving force behind the by-law must be looked at; and if that force emanates from a private source, and if that force is to save harmless or to reimburse the corporation

in respect of all costs, and is to reap the primary direct benefit from the by-law, leaving to the public only secondary and indirect benefit — we may quite safely conclude that the by-law is in private and not public interest.”

In the present case admittedly the activating force behind this by-law was that of the Kresge company and the Wood estate. Admittedly the Kresge company covenanted with the defendant corporation to save it harmless and to indemnify it in respect of all costs and claims which might flow from the passing of the by-law. I think it can also be conceded that the primary direct benefit from the by-law is that derived by the Kresge company, but I think it is equally clear, accepting the evidence of the members of council, that they were not influenced by the immediate or direct benefit flowing to Kresge company, but were influenced by what they considered to be the public welfare in that the Wood estate property, which had lain undeveloped and in derelict condition for many years, would be improved; that improvement of the general appearance of a very important part of the city would be the result of the Kresge construction; that construction work and increased merchandising facilities within the city are of benefit to the public, and that increased revenues would ultimately come to the city. I quite well appreciate that on the authority of some of the cases cited, these features are not necessarily to be considered as the chief concern of the council. Nevertheless, I think they must enter into the minds of the council in the improvement of the city, when weighed with the question of benefit or detriment which might arise to other parties by reason of the proposed change.

In considering the words above quoted from the judgment in *Wallace v. Dauphin*, *supra*, it must be noted that the learned judge there did not consider the by-law invalid because of its having been instigated by a private individual. As stated in the last paragraph of the judgment:

“ . . . it [the by-law] is voidable because primarily for private benefit of Mr. Stelck and not in public interests.”

In reviewing and considering the evidence in the present case, which I have done with great care, and in the light of counsel's argument, I have concluded that the plaintiff has failed to prove that the by-law was passed *mala fide* and not in the public interest. This burden was upon the plaintiff.

What was recognized in *United Buildings Corporation, Limited v. The City of Vancouver*, [1915] A.C. 345, 19 D.L.R. 97, 6 W.W.R. 1335, 28 W.L.R. 787, is cited with reliance by Estey J. in *Kuchma v. Rural Municipality of Tache, supra*, at p. 244, in these words, and with this citation from the earlier judgment:

"It was contended that the closing of the lane was not, in the interest of the public but was solely in the interest of the Hudson's Bay Company. Accusations of bad faith were made against the council. The case eventually went before the Privy Council where the action of the Vancouver council was upheld. Lord Sumner, at p. 350, states:

" 'It is easy, especially for those who conceive themselves to be sufferers by it, to suspect and to suggest and even to argue with some plausibility that such a transaction cannot have been carried through without some improper or sinister motive on the part of those members of the corporation who voted for it, and in this case all who were voting; and, since opinions differed on this question in the Court below, their Lordships freely recognize that it might bear one aspect or the other, but judging it, as they must do, upon a judicial survey of the whole proved materials, with the experience of men of the world and the full persuasion that such a charge must be proved by those who make it, their Lordships are unable to differ from the opinion of those members of the Court below who held that the transaction was free from impropriety or bad faith.' "

It may be of some particular interest in the present case to note that the closing of a portion of a prolongation of the same alleyway in the city of Hamilton, bisecting the block to the west of Hughson Street, was considered and upheld in *Re Mills and City of Hamilton* (1907), 9 O.W.R. 731, and I find that the words of Anglin J. therein, at p. 735, express my views in the summation of my opinion in this case, namely:

"I am unable to accede to Mr. Johnston's view that in order to support the by-law it is necessary to establish that, in the opinion of the council, the closing of the alleyway was in itself, and apart from any indirect and consequential advantages, such as the anticipated benefits to be derived by the citizens at large from the increase in Mr. Watkins's business, distinctly in the public interest. I know of no authority which warrants such

a proposition. I think it competent for the council to take into consideration all benefits of a public character which are likely to flow from the proposed change, whether they be direct or indirect, immediate or remote.

"Upon the whole of the material, which I have carefully considered, I find it impossible to reach the conclusion that the municipal corporation has been actuated, in passing this by-law, by any improper motives. It would require a very much stronger and a very much clearer case, in my opinion, to warrant me in discrediting the sworn statements of the mayor and members of the council, that when passing this by-law they believed it to be in the best interests of the citizens of Hamilton, whom they represented."

The plaintiff's counsel argued that his client, having selected the site for its proposed store building in the light of immediate surrounding physical conditions in the corporation, including the existence of a laneway of ancient public use, had a right to expect the maintenance by the corporation of the *status quo*.

This argument is, in my opinion, hardly tenable in the light of the well-recognized provisions of The Municipal Act, permitting municipal councils to pass by-laws closing or diverting highways.

There will therefore be judgment dismissing the action with costs.

Action dismissed with costs.

Solicitors for the plaintiff: Givins & Slater, London.

Solicitor for the defendant: A. J. Polson, Hamilton.

[COURT OF APPEAL.]

Saunders v. Randolph Hotel Company, Limited and Pidutti.

Defamation—Functions of Judge and Jury—Whether Words Capable of Defamatory Meaning—Whether Words in Fact Defamatory as Used—Proper Test to be Applied—Meaning to Reasonable Men.

In an action for defamation, it is for the trial judge to determine, as a question of law, whether the words used are capable of being defamatory in the sense that a reasonable man could construe them unfavourably in such a sense as to make some imputation upon the person complaining. *Nevill v. The Fine Art and General Insurance Company, Limited*, [1897] A.C. 68; *Newstead v. London Express Newspaper, Ltd.*, [1939] 4 All E.R. 319, referred to. If he holds them to be susceptible of a defamatory meaning in that sense, it is then for the jury to decide, as a matter of fact, whether they in fact had that meaning. The test is the same in each case, *viz.*, whether hearers of common and reasonable understanding, hearing the words in the circumstances in which they were uttered, would understand them in a defamatory sense, irrespective of what particular individuals, better informed on the matter alluded to, might take them to mean. *Hankinson v. Bilby* (1847), 16 M. & W. 442; *Johnston v. Ewart* (1893), 24 O.R. 116; *E. Hulton & Co. v. Jones*, [1910] A.C. 20; *Tolley v. J. S. Fry and Sons, Limited*, [1930] 1 K.B. 467, referred to. It is proper that evidence should be given of all the surrounding circumstances in order to place the jury, as far as possible, in the position of the bystander. It is then for the jury to say whether the words would, to a hearer of common and reasonable understanding, bear a defamatory meaning, not what the words in fact meant to the actual hearers of them.

AN APPEAL by the plaintiff from the judgment of Urquhart, J., after a trial with a jury, dismissing the action. The facts are fully stated in the reasons for judgment.

11th June 1945. The appeal was heard by HENDERSON, LAIDLAW and ROACH JJ.A.

J. R. Cartwright, K.C., for the plaintiff, appellant: The trial judge told the jury in effect that the test they should apply in answering question 5 was what reasonable persons, hearing the words, would reasonably understand them to mean. He should have put it to the jury that if the persons who did in fact hear the words understood them to impute unchastity to the plaintiff, and were not unreasonable in so doing, the plaintiff was entitled to recover, and this question should have been answered in the affirmative. The uncontradicted evidence of one of the chief witnesses was that he did in fact so understand them. I refer to *Gatley on Libel and Slander*, 3rd ed. 1938, p. 616; *Johnston v. Ewart* (1893), 24 O.R. 116, 20 Halsbury, 2nd ed. 1936, p. 418, para. 505; *C. v. D.*, 56 O.L.R. 209 at 211, 43 C.C.C. 235, [1925] 1 D.L.R. 734.

The fact that no objection was taken to the charge by counsel for the plaintiff is not fatal: *Brenner v. The Toronto*

Railway (1907), 15 O.L.R. 195 at 198, 8 C.R.C. 100; *Goodwin v. Taylor* (1918), 43 O.L.R. 141 at 153, 43 D.L.R. 610.

The defence was a denial that the words were spoken. The jury, on conflicting evidence, found every issue of fact in the plaintiff's favour except question 5. They could not have answered that question as they did if they had been properly instructed, in view of the uncontradicted evidence of the witness Marcotte. There should therefore be a new trial.

J. M. Hickey, for the defendants, respondents: Counsel for the plaintiff at the trial agreed to the form of question 5, to which objection is now taken. The real difficulty was occasioned by the plaintiff's inability to obtain a room at the hotel. The issue is a very narrow one: Did the hearers of the words in question understand them to be defamatory? [LAIDLAW J.A.: Is it a question of what the actual hearers thought?] Slander lies in the ears of the people hearing it. [HENDERSON J.A.: Must the hearers believe the slander before the words become actionable?] The words complained of here were not capable, in the circumstances, of a defamatory or actionable meaning, nor was there any innuendo. The judge's charge, as a whole, made it clear to the jury what they had to determine. [LAIDLAW J.A.: Are not the tone and manner of the individual defendant important? If that is so, what difference does it make what knowledge the hearers had?] The findings of fact by the jury are conclusive unless the verdict was so plainly unreasonable and unjust as to satisfy the Court that no jury, reviewing the evidence as a whole and acting judicially, could have reached such a verdict.

J. R. Cartwright, K.C., in reply: The fact that the plaintiff's counsel agreed to the form of question 5, while it might result in her being deprived of costs, is not fatal to her right of appeal, if the question directed the minds of the jury to the wrong consideration. The proper consideration should have been whether the persons who actually heard the words understood them in a defamatory sense.

Cur. adv. vult.

27th June 1945. The judgment of the Court was delivered by

LAIDLAW J.A.:—The plaintiff appeals from a judgment of Urquhart J., delivered 13th February 1945, dismissing an action

for slander after trial before a jury and answers made by it to questions put by the trial judge.

The facts are these: The appellant and Mrs. Mary Paracka, an employee of the appellant, were motoring from Montreal to Toronto. En route they came on Philip Marcotte, an airman, who was on the highway, seeking transportation towards Toronto. They took him into the car and when they reached Kingston stopped there. The appellant and Mrs. Paracka intended to stay there over night. Mrs. Paracka inquired at the La Salle Hotel desk and was informed that there were no rooms available. All three persons then had dinner together in the hotel. Afterwards, when they came out of the dining-room, the appellant noticed several persons at the desk, apparently obtaining room accommodation. She approached the desk clerk, Miss Pidutti, and asked for a double room with a bath. The hotel clerk said she did not have any and the appellant then asked for single rooms. In reply Miss Pidutti said: "We haven't any rooms for you." An argument then followed between the appellant and Miss Pidutti, in which the statement in substantially the same language was repeated. The statement was heard by Mrs. Paracka and Philip Marcotte, who were standing nearby awaiting the outcome of the appellant's efforts to obtain accommodation.

In the statement of claim it is alleged that Miss Pidutti "with a loud voice and emphatic emphasis in the hearing of all said 'I told you there are no rooms here for you.'" It is further alleged that, "The implication, the inference and the plain meaning to be drawn and placed upon the aforesaid words to persons of ordinary intelligence and understanding and falsely and maliciously spoken and published of the plaintiff in the presence of Mary Paracka and Philip Marcotte and several other guests of the said hotel was that she (the plaintiff) was a person of unchaste mind and of loose and immoral character and the words so spoken of the plaintiff imputed to her unchastity. The said words so uttered and intended by the occasion, the manner and the public place where and when spoken were so understood in a malicious and defamatory sense."

The learned trial judge held that the words complained of were capable of being defamatory and submitted certain questions to the jury, to which answers were made as follows:

"1. Did the defendant Pidutti on the 6th day of August, 1944, make the following statement 'There are no rooms for you'? Answer yes or no. A. Yes.

"2. If your answer to question 1 is 'yes', was the statement repeated? Answer yes or no. A. Yes.

"3. If so, how many times? A. Repeated once.

"4. If your answer to question 1 is 'yes', was the statement heard by persons other than the plaintiff? Answer yes or no. A. Yes.

"5. If your answers to questions 1 and 4 are both 'yes', would the words uttered be understood by persons of ordinary reason in the position of those who heard these statements as imputing unchastity to the plaintiff? Answer yes or no. A. No."

The principal ground of appeal is that the learned judge erred in law in his charge to the jury in stating in effect that the test which the jury should apply in answering question 5 was what reasonable persons who heard the words would reasonably understand, and that he should have put it to the jury that if the persons who did in fact hear the words, in fact understood them to impute unchastity, and were not unreasonable in doing so, the jury should find for the plaintiff in answer to the question.

It is essential at once to make plain the distinction between the preliminary question of law to be determined by the judge and the question of fact to be found by the jury in such a case as this. The question for the Court is whether the words are capable of being defamatory in the sense "that a reasonable man could construe them unfavourably in such a sense as to make some imputation upon the person complaining." *Nevill v. The Fine Art and General Insurance Company, Limited*, [1897] A.C. 68 at 76-7, referred to in *Newstead v. London Express Newspaper, Ltd.*, [1939] 4 All E.R. 319 at 329, 330. "If the judge holds the words to be susceptible of a defamatory meaning in that sense, the jury are the constitutional tribunal to decide whether the words in fact have that meaning. That is to say, it is for the jury to decide whether the reasonable man whom they may be supposed collectively to typify *would* (not *could*) so construe them . . . The correct view is that, if the words are reasonably capable of two or more meanings, of which one is defamatory, it must be left to the jury to determine in which sense a reasonable man would understand them": per du Parc L.J., in

Newstead v. London Express Newspaper, Limited, supra, at p. 330.

It may be observed that the question put to the jury in that case, where the issue was whether the words complained of referred to the plaintiff, was this: "Would reasonable persons understand the words complained of to refer to the plaintiff?"

There is nothing defamatory in the words themselves, apart from the circumstances and the manner in which they were spoken. It was quite proper that evidence should be given of all the surrounding circumstances. Such evidence was admissible in order to place the jury as far as possible in the position of the bystander. In such a position, with knowledge of the circumstances as disclosed in evidence, it was for the jury to say as a fact whether the words spoken would to a hearer of common and reasonable understanding impute unchastity to the appellant. It was not merely a question of whether particular hearers did ascribe such a meaning to the words.

The jury is not necessarily bound by the meaning taken from the words by the person or persons to whom they were published. It is open to the jury to say that such a meaning was unreasonable and would not be given by reasonable persons under the circumstances. Were it otherwise an individual of prejudice, bias or evil mind might wickedly attribute defamatory meaning to words and thereby create grave injustice. Likewise a person of low mentality and intellect might do great wrong by attaching an unfair, unreasonable meaning to words published to him or her.

In *Hankinson v. Bilby* (1847), 16 M. & W. 442, 153 E.R. 1262, referred to in *Johnston v. Ewart* (1893), 24 O.R. 116 at 123, it is said that the words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals, better informed on the matter alluded to, might form a different judgment on the subject.

The tort of defamation consists " . . . in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it": per Lord Loreburn L.C. in *E. Hulton & Co. v. Jones*, [1910] A.C. 20 at 23. In *Tolley v. J. S. Fry and Sons, Limited*, [1930] 1 K.B. 467 (reversed [1931] A.C. 333, on grounds not affecting

the authority to be now quoted), Greer L.J., at p. 479, stated: "Words are not defamatory unless they amount to an attack on a man's reputation or character; they must tend to disparage him in the eyes of the average sensible citizen. Words are not actionable as defamatory, however much they may damage a man in the eyes of a section of the community, unless they also amount to disparagement of his reputation in the eyes of right thinking men generally. To write or say of a man something that will disparage him in the eyes of a particular section of the community, but will not affect his reputation in the eyes of the average right thinking man, is not actionable within the law of defamation."

It is my opinion that the principle upon which a judge must proceed to determine the question whether words are capable of being defamatory applies equally to the determination by a jury of the question of fact whether the words used under particular circumstances would be defamatory. To succeed a complainant must satisfy the jury that the person or persons to whom the offending words were published would reasonably think them to be defamatory. The jury is quite at liberty to conclude that the thoughts of the audience were unreasonable under the circumstances. In the particular case presently under consideration this is the plain meaning to be given to the finding of the jury.

My view is that the learned trial judge properly and correctly charged the jury in accordance with the principles I have discussed, and I can find no substantial error in his directions. Moreover, I think that the appellant cannot now successfully object either to the form of question 5 submitted to the jury, or to the portions of the charge to the jury under discussion. At trial each and every question was the subject of consideration by counsel before it was left with the jury. When question 5 was read to counsel by the judge, counsel for the plaintiff (appellant) expressly agreed therewith in these words: "That will cover it, my Lord." Again, there was no objection made by counsel for the appellant to the charge of the learned trial judge on the matters now the subject of complaint. While such a fact is not necessarily fatal in all cases to the rights of the appellant, nevertheless it is too late, in my opinion, to found an appeal on such grounds where no objection has been taken at trial to a charge which proceeds without substantial misdirection or non-

direction on the basis of questions put to the jury, to which the counsel have agreed.

Finally, in respect of the isolated parts of the charge as to which counsel makes complaint, I express the view that they did not in any event cause a substantial wrong or miscarriage of justice: The Judicature Act, R.S.O. 1937, c. 100, s. 27(1); *Storry v. C.N.R.*, [1941] 4 D.L.R. 169 at 174, 53 C.R.T.C. 71.

My opinion is that for the reasons given the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Lamport, Ferguson & Company, Toronto.

Solicitor for the defendants, respondents: J. M. Hickey, Kingston.

[COURT OF APPEAL.]

Rex v. Lamontagne.

Constitutional Law—Validity of Legislation—Criminal Law—Civil Consequences of Criminal Use of Property—The Gaming and Betting Act, 1942 (Ont.), c. 19—The Criminal Code, R.S.C. 1927, c. 36, ss. 228, 229, 230—The British North America Act, ss. 91(27), 92(13), (15).

The Gaming and Betting Act, 1942, is legislation in relation to criminal law, since in express terms it creates an offence and provides for punishment therefor by imprisonment. While the Provinces have a limited jurisdiction to legislate in relation to criminal law, under s. 92(15) of The British North America Act, by the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to matters within s. 92, otherwise exclusive jurisdiction to legislate in relation to that subject is assigned to the Parliament of Canada.

The respondent, as the registered owner of premises in respect of which an order had been made under The Gaming and Betting Act forbidding their use in breach of ss. 228, 229 and 235 of The Criminal Code, was convicted under s. 8 for a violation of that order. The violation alleged and relied upon was established by proving that another person had been convicted of a breach of s. 229 upon the premises.

Held, the conviction was invalid. If the closing order came within the terms of the Act, the Act must be held to be *ultra vires*, and if the order was not justified by the Act, there was nothing to support the conviction.

(*Per* ROBERTSON C.J.O. and GILLANDERS J.A.; McRUER J.A. *contra*).

Criminal Law—Special Pleas—Autrefois convict—When Plea Maintainable—Similarity of Offences.

A conviction under s. 228(2) of The Criminal Code will not support a plea of *autrefois convict* if the same person is later charged, as

registered owner of premises against which a closing order has been made under s. 2 of The Gaming and Betting Act, 1942, with a violation of that order arising out of the keeping of a bawdy house in the premises by another person. The test of the validity of the special plea is in the similarity of the offences, and not in the similarity of the evidence by which the charges are made out. *Rex v. Barron*, [1914] 2 K.B. 570; *Rex v. Kissick*, 50 Man. R. 194, applied. (*Per curiam*).

Summary Convictions—Appeals to Court of Appeal—Effect of Attorney-General's Certificate—The Summary Convictions Act, R.S.O. 1937, c. 136, s. 14(2).

Where the Attorney-General certifies, under s. 14(2) of The Summary Convictions Act, that the judgment of a County Court Judge (on appeal from a summary conviction proceeding) involves questions of law of sufficient importance to justify an appeal, and goes on to state the questions of law which, in his opinion, are involved, the Court is not limited, on the hearing of the appeal, to the questions so set out. It is neither necessary nor usual for the certificate to state any question of law, and there is nothing in the Act that excludes argument, once that certificate has been given, upon any question of law that was open before the County Court Judge. (*Per ROBERTSON C.J.O. and GILLANDERS J.A.*).

AN APPEAL by the informant from the judgment of Gordon Co. Ct. J., of the County Court of the County of Essex, allowing an appeal from a conviction under s. 8 of The Gaming and Betting Act, 1942 (Ont.), c. 19. The facts are fully stated in the reasons for judgment of ROBERTSON C.J.O.

13th and 14th March 1945. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and MCRUER JJ.A.

C. R. Magone, K.C., for the informant, appellant: In his reasons for judgment, the trial judge says that the *whole* of The Gaming and Betting Act, 1942 (Ont.), c. 19, relates to the criminal law, and not to property and civil rights or matters of a local and private nature, and then proceeds to declare only ss. 7 and 8 *ultra vires*.

There are many acts which, if committed by the accused, would have been violations of the closing order, and rendered her liable to penalties under the Act, without being in any way violations of The Criminal Code, R.S.C. 1927, c. 36. The final words of para. 1 of the closing order are mere surplusage. The important part is the closing of the premises against any use except as a private residence.

The trial judge has not disposed of the plea of not guilty, having decided the appeal solely on two preliminary points. If this Court is of the opinion that he was wrong in his reasons,

the matter should be remitted to him to dispose of that plea: *Re Armstrong and Armstrong*, [1934] O.W.N. 306. [ROBERTSON C.J.O.: There was a penalty imposed by the magistrate.] [McRUER J.A.: We might come to the conclusion that the plea of *autrefois convict* could not succeed, but that effect should be given to the defence of *res judicata*.]

The statute in question deals with property and civil rights in the Province, and is within s. 92(13) of The British North America Act. It is not in relation to the criminal law, and it would not be within the power of the Dominion Parliament to pass an Act in such terms, since it deals solely with the right to use private property. Alternatively, it may be said that the subject matter of the Act falls, in one aspect, within s. 92, and, in another aspect, within s. 91: *Hodge v. The Queen* (1883), 9 App. Cas. 117, C.R. [9] A.C. 13, 3 Cart. 144; *Reg. v. Wason* (1890), 17 O.A.R. 221; *Reg. v. Stone* (1892), 23 O.R. 46.

The statute here in question is indistinguishable from that dealt with in *Bédard v. Dawson and The Attorney-General for Quebec*, [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 412, and the question is therefore determined by authority binding on this Court. [GILLANDERS J.A.: Your argument is that this statute aims at the prevention of nuisances rather than the punishment of crime?] Precisely. The only important difference between this Act and that considered in the *Bédard* case is that our Act itself provides for penalties. [GILLANDERS J.A.: The Quebec statute also required a notice to abate the nuisance, then an injunction, and it was only after those steps that punishment could be imposed.]

If the Act is found to deal with property and civil rights, then the fact that it provides penalties for breach does not render it invalid; this is provided for in s. 92(15) of The British North America Act: *Hodge v. The Queen*, *supra*.

I refer also to *The Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396, 76 C.C.C. 227, [1941] 3 D.L.R. 305; *McDonald v. Down*, [1939] 2 D.L.R. 177, 71 C.C.C. 179; *Lyburn et al. v. Mayland et al.*, [1932] A.C. 318, [1932] 2 D.L.R. 6, 57 C.C.C. 311, [1932] 1 W.W.R. 578; *Rex v. Hayduk*, [1938] O.R. 653, 71 C.C.C. 134, [1938] 4 D.L.R. 762.

The trial judge was wrong in holding that the plea of *autrefois convict* was maintainable. The test is not whether the two

charges arise out of the same facts, but whether the offences are the same: *Buller v. Wendover*, 40 O.W.N. 250, 55 C.C.C. 143, [1931] 1 D.L.R. 986; *Morelli v. The King*, 58 C.C.C. 128, [1932] 3 D.L.R. 620; *Rex v. Bayn*, [1932] 2 W.W.R. 113, 59 C.C.C. 89, [1933] 1 D.L.R. 497; *Rex v. Barron*, [1914] 2 K.B. 570, 10 Cr. App. R. 81; *Rex v. Tonks* (1915), 11 Cr. App. R. 284 at 287; *Rex v. Sweetman*, [1939] O.R. 131, 71 C.C.C. 171, [1939] 2 D.L.R. 70; *Rex v. Kissick*, 50 Man. R. 194, [1942] 2 W.W.R. 418, 78 C.C.C. 34, [1942] 3 D.L.R. 431.

[MCRUER J.A.: How do you justify the procedure followed here? Evidence of the keeping of a bawdy house might have been admissible in support of a charge under the Act, but you first laid an information and obtained a conviction under The Criminal Code, and then charged the offence under the Act. How is that reconcilable with s. 15 of the Code?] Section 15 applies only to criminal matters strictly so called. It is well established that there can be prosecutions and convictions under both Dominion and Provincial statutes with respect to the same liquor: *Rex v. Kissick*, *supra*.

N. J. Riordan, for the accused, respondent: Section 2(1) of the Act provides for an application to the Court for an order, but nowhere in the Act is there express authority for the making of a closing order. [ROBERTSON C.J.O.: That would not affect the validity of the Act.] Section 7 provides for the punishment of a person who may have no knowledge of what is happening. Section 229 of The Criminal Code provides for the situation in the case of a person who has knowledge. The Code defines disorderly houses, says who shall be guilty of offences in respect thereof, and prescribes penalties. Section 7 of this Act interferes with this.

The accused is being twice punished for the same offence, both under s. 228(2) of The Criminal Code and under the Provincial statute.

The Act relates entirely to public morals, and is therefore *ultra vires*: *Attorney-General for Ontario v. The Hamilton Street Railway Company et al.*, [1903] A.C. 524, C.R. [13] A.C. 201, 7 C.C.C. 326, 2 O.W.R. 672; *Re Race-Tracks and Betting* (1921), 49 O.L.R. 339, 36 C.C.C. 357, 61 D.L.R. 504; *Rex v. Lichtman* (1923), 54 O.L.R. 502, 42 C.C.C. 1; *Rex v. Hayduk*, [1938] O.R. 653, 71 C.C.C. 134, [1938] 4 D.L.R. 762; *The Attorney-General*

for *Ontario v. Koynok et al.*, [1940] O.W.N. 555, 75 C.C.C. 100, [1941] 1 D.L.R. 548; *Rex v. Ellis* (1939), 73 C.C.C. 120, 6 I.L.R. 103.

The Quebec statute considered in *Bédard v. Dawson and The Attorney-General for Quebec*, *supra*, differs from The Gaming and Betting Act, 1942, not only in the method of obtaining the result, but also in the procedure to be followed. The penalties there are not prescribed in the Act, but are to be found in the Code of Civil Procedure; proceedings by injunction are wholly civil. Further, the Quebec statute aims only at a knowing violation. The present case is also distinguishable from *McDonald v. Down*, *supra*, and *Fineberg v. Taub*, 77 Que. S.C. 233, 73 C.C.C. 37, [1940] 1 D.L.R. 114.

As to *autrefois convict*, I rely on s. 15 of The Criminal Code, and *Rex v. Blanchet* (1919), 30 Que. K.B. 66, 36 C.C.C. 10, 61 D.L.R. 286; *Rex v. Fitzpatrick*, 52 C.C.C. 119, [1929] 4 D.L.R. 95; *Rex v. Nadan*, 21 Alta. L.R. 193, [1925] 1 W.W.R. 97, 43 C.C.C. 121, [1925] 1 D.L.R. 429; *Morelli v. The King*, 58 C.C.C. 128, [1932] 3 D.L.R. 620.

C. R. Magone, K.C., in reply.

Cur. adv. vult.

28th June 1945. ROBERTSON C.J.O.:—This is an appeal, on the certificate of the Attorney-General for Ontario, by Claude Renaud as informant, against Cecile Lamontagne as defendant, from the order of Judge Gordon, of the County Court of the County of Essex, dated 15th December 1944, allowing an appeal of Cecile Lamontagne from her conviction by a Magistrate of an offence under s. 8 of The Gaming and Betting Act, 1942 (Ont.), 6 Geo. VI, c. 19.

The statute in question provides in s. 2 that the Attorney-General, or any other person, may apply to the Court (defined as the County or District Court of the county or district in which a place is situate), by originating notice of motion, for an order closing any place with respect to which a conviction has been made within the preceding three months, under s. 228, 229, 230 or 235 of The Criminal Code, R.S.C. 1927, c. 36, against its use for all or any purposes for any period not exceeding one year. The Act makes special provision with respect to service of the notice of motion upon the registered owner and the lessee, tenant or other occupant of such place. Under s. 3

the order may be registered in the registry office or land titles office in which the title to such place is recorded, but the order shall not affect the rights of any person in such place, acquired after the making of such order, without notice, in good faith and for valuable consideration. Section 4 provides that after the making of an order closing any place, the registered owner or other person having any interest therein, upon establishing his good faith and ignorance of the use of the place in contravention of the sections of The Criminal Code already cited, and upon furnishing certain security that such place will not be used during the term of the order for any purpose in contravention of such sections of The Criminal Code, may apply to the Court for an order suspending the operation of the order closing the said place. The same section provides for registration of the last-mentioned order. It also provides for forfeiture of the security given, and for the order made under s. 2 again having full force and effect, upon the conviction of any person for an offence against any of the sections of The Criminal Code already mentioned with respect to such place. Section 5 provides for the owner of any premises, upon notice and upon proof that the place, or its contents, is or are likely to suffer damage by reason of the order closing such place, applying for an order under such conditions and limitations as the Court may impose, permitting the occupation of the place, as far as may be necessary to prevent it, or the contents thereof, from being damaged. Section 6 makes provision in regard to rules of practice and procedure, and is not important here. Sections 7 and 8 of the Act I quote in full:—

“7. Where an order is made under this Act closing any place and such place is used in violation of such order,

“(a) the registered owner of such place; and

“(b) any person found in such place while it is being so used, shall be deemed to have violated such order, unless in the case of a person mentioned in clause b, he was there for a lawful purpose, the proof whereof shall be upon him.

“8.—(1) Any person who violates the provisions of this Act or of any order made hereunder, shall be guilty of an offence and shall be liable to imprisonment for not less than one month and not more than one year.

"(2) Where any person convicted under subsection 1 is a corporation, it shall be liable to a penalty of not less than \$1,000 nor more than \$5,000.

"(3) The penalties imposed under this section may be enforced under the provisions of *The Summary Convictions Act*."

One Blanche Lapalme having been convicted by a magistrate of an offence against s. 229 of The Criminal Code with respect to the premises known as No. 359 Brant Street, in the city of Windsor, an order was made by His Honour Judge Gordon, on the 18th May 1944, on the application of the appellant, who is the Chief of Police for the city of Windsor, in the presence of counsel for the owners and tenants of the property, that the premises known as No. 359 Brant Street be closed until the 30th day of March 1945 "against its use for all purposes except as a private residence, including the right of keeping boarders and carrying on any business which may sometimes be properly carried on in a private residence, but in so using the said property, no violation of sections numbers 228, 229 and 235 of the Criminal Code shall be carried on in the said premises."

On 3rd July 1944 an information was laid against one Alberic Lavoie charging him with keeping a common bawdy house on the premises known as 359 Brant Street, Windsor, contrary to s. 229 of The Criminal Code. On this charge Lavoie was convicted on 18th July 1944.

On 5th July 1944 an information was laid under The Criminal Code charging Cecile Lamontagne as the landlady, lessor, tenant, occupier or otherwise having charge or control of the premises 359 Brant Street, with having, on the 3rd day of July 1944 and previously, unlawfully and knowingly permitted such premises, or a part thereof, to be let or used for the purpose of a disorderly house, namely a common bawdy house, contrary to s. 228, subs. 2 of The Criminal Code. Upon this charge Cecile Lamontagne, having pleaded guilty, was convicted on 19th July 1944, and she was thereupon sentenced to a term of one month's imprisonment and to pay \$200 including costs, and in default of payment of the penalty and costs, to be imprisoned for a further term of three months, unless the penalty and costs were sooner paid.

On 19th July 1944 the present appellant laid an information, under The Gaming and Betting Act, 1942, before the magistrate,

charging that Cecile Lamontagne, at the city of Windsor, on the 3rd day of July 1944, and previously, did unlawfully violate the order of the 18th day of May 1944, made by the County Judge, with respect to the closing of the premises, No. 359 Brant Street against use for certain purposes as therein set forth, the information alleging "that the said premises were [used] in violation of section 229 of the Criminal Code." Upon this charge Cecile Lamontagne was tried on the 20th day of July 1944 by the magistrate, and was convicted. She was there-upon sentenced to be imprisoned in the county gaol and kept at hard labour for three months, to run consecutively with the other sentence imposed by the magistrate on 19th July 1944. This is the conviction that the County Court Judge found to be invalid, on appeal to him.

On the trial of the last-mentioned charge before the magistrate, a police sergeant was called for the prosecution and gave evidence that he had made a search in the registry office and that, according to the records, at the date of the order closing the premises, No. 359 Brant Street, Windsor, Cecile Lamontagne and Tillie Lazar were the registered owners of these premises, and that on the 3rd July 1944, and at the then present date, Cecile Lamontagne was the registered owner. This statement appears to have been accepted, without objection, as sufficient evidence of ownership. This witness also said in evidence that "On July 18th Alberic Lavoie was convicted in Police Court of keeping a disorderly house, to wit, a common bawdy house", and that Cecile Lamontagne was in the premises and knew they were operated as a common bawdy house. I cannot find that any more formal proof of the conviction of Lavoie was given before the magistrate, but nothing seems to have been made of any defect in that regard, if there was any. It is to be noted that it was the violation of s. 229 of The Criminal Code by Lavoie, and not Cecile Lamontagne's violation of s. 228(2), that was relied upon as the violation of the order closing the premises.

Counsel for the defence filed as an exhibit a certified copy of the conviction of Cecile Lamontagne on 19th July 1944, of an offence under s. 228(2) of The Criminal Code. No doubt, his purpose was to make a foundation for the plea of *autrefois convict*, which he had set up.

An appeal was taken on behalf of Cecile Lamontagne to the County Court from her conviction of the offence of violating the order made under s. 2 of The Gaming and Betting Act, 1942. The appeal was made under s. 13 of The Summary Convictions Act, R.S.O. 1937, c. 136, and was heard by His Honour Judge Gordon. Two grounds of appeal were mainly relied upon in support of the appeal. First was a plea of *autrefois convict*. As a second ground it was contended that The Gaming and Betting Act, 1942, is *ultra vires* the Provincial Legislature. The learned County Judge allowed the appeal on both grounds.

In dealing with the plea of *autrefois convict*, the learned County Judge seems to have been under a misapprehension as to the case for the prosecution. He says, "It is not disputed that the second conviction [that is, the conviction for violation of the order] against the appellant was obtained simply by proof of the previous conviction made against her for an offence against section 228(2) of the Code. It is not suggested she committed an offence against any statute or law after July 3rd, 1944, except an alleged offence against The Gaming and Betting Act." The learned judge proceeded to say that, in obtaining this second conviction against the appellant, no new or fresh evidence was adduced, nor new facts or circumstances revealed, except that the prosecution proved the conviction against Lavoie for an offence against s. 229 of the Code, which he did not deem material.

The fact is that the violation of the closing order with which Cecile Lamontagne was charged, and of which she was convicted, consisted in the offence against s. 229 of The Criminal Code of which Lavoie was convicted, and not that against s. 228(2) of which Cecile Lamontagne was convicted. It so appears both in the information and in the formal conviction. The only evidence of the violation of the order put in by the prosecution consisted of the police sergeant's statement of the fact of the conviction of Lavoie of an offence against s. 229, and of Cecile Lamontagne's knowledge of the use made of the premises, as stated in that conviction. The conviction of Cecile Lamontagne of an offence against s. 228(2) of The Criminal Code was put in by her own counsel, and was relied upon by him to support his plea of *autrefois convict*. That counsel for Cecile Lamontagne

tagne always understood the matter in this way clearly appears from his statement in opening his appeal to the County Judge. In telling of the proceedings before the magistrate under The Gaming and Betting Act, 1942, he said "a plea of not guilty was entered on the information, and the Crown proceeded to prove the charges by producing the conviction of Lavoie who had been convicted as the keeper, which was the basis of the conviction made under The Gaming and Betting Act." The view held by the County Judge in this particular, in which I venture to think he was in error, may have, in some degree, influenced him in reaching the conclusion that *autrefois convict* was a good defence in this case.

Respondent's counsel was not quite accurate in stating that the conviction of Lavoie was produced. All the evidence given of that conviction by the prosecution was the statement made by the police sergeant that I have already referred to. That statement may not have been good evidence of the violation of the closing order, but no objection was made at the time and no point has been made of it since.

The charge against Cecile Lamontagne on which she was first convicted was a breach of s. 228(2) of The Criminal Code—that is, that as landlord, lessor, tenant, occupier or otherwise, she, Cecile Lamontagne, had charge or control of the premises in question, and that she, Cecile Lamontagne did unlawfully and knowingly permit such premises, or a part thereof, to be let or used for the purpose of a disorderly house. The second charge against her, to which she pleaded *autrefois convict* as a defence, was that she violated the closing order of 18th May 1944, in respect of the premises No. 359 Brant Street, in that the premises were used in violation of s. 229 of The Criminal Code, the use of the premises put forward in support of the charge being their use by Lavoie as a common bawdy house. This second conviction was for an offence created by The Gaming and Betting Act, 1942, and the guilt of the registered owner did not depend upon proof of either knowledge or permission, on her part, of the use made of the premises. It was based upon the order and its violation by another person. Section 7 of the Act provides, without qualification in the case of the registered owner, that where a closing order has been made and the place

is used in violation of such order, the registered owner of the place shall be deemed to have violated the order.

In my opinion the plea of *autrefois convict* does not avail the respondent as a defence in the proceeding on the closing order of 18th May 1944. The test is the similarity of the offences, and not the similarity of the facts that support the charges. A person is not to be placed in peril of being convicted twice of the same offence: *Rex v. Barron*, [1914] 2 K.B. 570, 10 Cr. App. R. 81, and s. 907 of The Criminal Code. Cecile Lamontagne was not convicted, and could not have been convicted in the proceeding on the charge of an offence against s. 228(2) of The Criminal Code, of the offence of violating the order made under The Gaming and Betting Act, 1942. See *Rex v. Kissick*, 50 Man. R. 194, [1942] 2 W.W.R. 418, 78 C.C.C. 34, [1942] 3 D.L.R. 431. As she pleaded guilty to the first charge, it became unnecessary for the prosecution to call any evidence to establish that she had been guilty of a breach of s. 228(2) of The Criminal Code, and, therefore, it is not possible to say what facts the prosecution would have relied upon as constituting that offence. It is by no means possible to say that the prosecution, in seeking to establish that charge, would have relied upon the offence of which Lavoie was convicted under s. 229 of The Criminal Code. There may have been other facts to establish the guilt of Cecile Lamontagne on the charge of a breach of s. 228(2), but it became unnecessary to give any evidence of them when she entered a plea of guilty to that charge. In view of the opinion I have formed with respect to the validity of the closing order, it is unnecessary to pursue further the matter of the plea of *autrefois convict*. With respect, I am unable to agree with the opinion of the learned County Judge on that matter.

In the Attorney-General's certificate, given under s. 14(2) of The Summary Convictions Act, that the judgment of the County Judge in this case involves a question of law of sufficient importance to justify an appeal, he states two questions of law: (1) Was the learned judge right in giving effect to the plea of *autrefois convict*? and (2) Was the learned judge right in holding that ss. 7 and 8 of The Gaming and Betting Act, 1942, are *ultra vires*?

I do not think this Court, on such an appeal as this, is confined to the consideration of the points of law set forth in the certificate of the Attorney-General. In fact, it is not necessary that the certificate should state any question of law, nor do I think it is usual to have it do so. It is sufficient if the Attorney-General, in his certificate, says that, in his opinion, the judgment involves a question of law of sufficient importance to justify an appeal. An appeal thereupon lies from the judgment of the County Judge to the Court of Appeal, and there is nothing in The Summary Convictions Act that excludes the argument, on the appeal to the Court of Appeal, of any question of law that was open before the County Judge. The County Judge, in this case, expressed doubt as to the validity of The Gaming and Betting Act, 1942, as a whole, and counsel for the respondent on this appeal submitted argument against the validity of other parts of the Act than ss. 7 and 8, which the County Judge specifically held to be *ultra vires*, and which alone are mentioned in the certificate of the Attorney-General. I see no reason why it was not open to counsel to do so. Nor do I see any reason why this Court cannot consider the further question whether, even if the Act itself is held to be valid, it authorizes the making of an order in the terms of the order of 18th May 1944, made in this case. In my opinion both questions may be raised on this appeal.

I shall consider, first, the validity of The Gaming and Betting Act, 1942. To support the conviction in question the appellant must, of necessity, rely upon the order of 18th May 1944, as an order that The Gaming and Betting Act, 1942, authorizes to be made, and he must likewise rely upon the statute as valid that authorizes the making of the order. That statute is the only possible warrant for the order, and for the conviction of the respondent for its violation. Now, the order of 18th May 1944, in express terms, forbids the violation on the premises, 359 Brant Street, of ss. 228, 229 and 235 of The Criminal Code. This was, no doubt, the real purpose of the closing order, and substantially all that it was intended to cover. The order is drawn in terms that are needlessly involved and obscure, for the premises, presumably a dwelling-house, are permitted by the order, to be used "as a private residence, including the right of keeping boarders and carrying on any business

which may sometimes be properly carried on in a private residence," but so that in so using the property there shall be no breach of the enumerated sections of The Criminal Code. The only violation of the order with which the respondent was charged was the violation of s. 229 of The Criminal Code, and the conviction of Lavoie of an offence against that section of The Criminal Code, and the respondent's knowledge of it, was the only evidence given in support of the charge.

We have then an order that expressly forbids the violation of ss. 228, 229 and 235 of The Criminal Code upon these premises, and the conviction of the respondent for an offence in the violation of that order by Lavoie's breach of s. 229 of The Criminal Code, and for this offence the sentence of the respondent to prison, and all of this the appellant contends is done upon the authority of The Gaming and Betting Act, 1942. There can, I think, be no question that such a statute is legislation in relation to criminal law.

In *Proprietary Articles Trade Association v. Attorney-General for Canada et al.*, [1931] A.C. 310 at 324, [1931] 2 D.L.R. 1, 55 C.C.C. 241, [1931] 1 W.W.R. 552, it is said that "Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State." In accord with this statement is the much older definition of "crime" given by Littledale J. in *Mann v. Owen et al.* (1829), 9 B. & C. 595 at 602, 109 E.R. 222, "The proper definition of the word 'crime' is an offence for which the law awards punishment." By s. 8 of the statute here in question "Any person who violates the provisions of this Act or of any order made hereunder, shall be guilty of an offence and shall be liable to imprisonment."

Exclusive jurisdiction to legislate in relation to criminal law is specifically assigned to the Parliament of Canada by s. 91(27) of The British North America Act. "Criminal law" means the criminal law in its widest sense: *Attorney-General for Ontario v. The Hamilton Street Railway Company et al.*, [1903] A.C. 524 at 529, C.R. [13] A.C. 201, 7 C.C.C. 326, 2 O.W.R. 672; *Proprietary Articles Trade Association v. Attorney-General for Canada*, *supra*; *Attorney-General for British Columbia v. Attorney-General for Canada et al.*, [1937] A.C. 368, [1937] 1 D.L.R. 688, 67 C.C.C. 193, [1937] 1 W.W.R. 317. No one doubts the

validity of ss. 228, 229, 230 and 235 of The Criminal Code. Section 228(2) of The Criminal Code is as follows:—

“2. Any one who, as landlord, lessor, tenant, occupier, agent or otherwise, has charge or control of any premises and knowingly permits such premises or any part thereof to be let or used for the purposes of a disorderly house shall be liable upon summary conviction to a fine of two hundred dollars and costs, or to imprisonment not exceeding two months, or to both fine and imprisonment.”

Section 229 makes it an indictable offence to keep a disorderly house, and provides for imprisonment as a penalty; it also, in subs. 3, constitutes it an offence to be an inmate of a common bawdy house and provides the punishment therefor. Subs. 5 is as follows:—

“5. If the landlord, lessor or agent of premises in respect of which any person has been convicted as the keeper of a common bawdy house fails, after such conviction has been brought to his notice, to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and subsequently any such offence is again committed on the said premises, such landlord, lessor or agent shall be deemed to be a keeper of a common bawdy house unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.”

In my opinion it is quite obvious that The Gaming and Betting Act, 1942—always assuming that, as counsel for the appellant contends, the order of 18th May 1944 is such an order as the statute authorizes—makes it an offence to do, and prescribes punishment for, what is already made criminal by these sections of The Criminal Code. It is true that the provisions of The Criminal Code are not confined to offences committed at a particular place, nor are the persons who may be guilty of an offence confined to the registered owner and persons “found in”. On the other hand, a registered owner may be guilty of an offence under The Gaming and Betting Act, 1942, although he does not knowingly permit the prohibited use of his premises. The provisions of The Criminal Code and of The Gaming and Betting Act, 1942, do, however, to a substantial extent, overlap and deal with the same conduct. That is clearly illustrated by the case we are now dealing with. The respondent was con-

victed of an offence under s. 228(2) of The Criminal Code for that she "on the 3rd day of July 1944 and previously, as the landlady, lessor, tenant, occupier or otherwise, did have charge and control of the premises known as 359 Brant Street, and did unlawfully and knowingly permit such premises or a part thereof to be let or used for the purpose of a disorderly house, namely, a common bawdy house." She was also convicted under The Gaming and Betting Act, 1942, for that she, on the 3rd day of July 1944, did unlawfully violate a certain order, the prohibition of which the conviction quotes and then continues, "that the said premises were used in violation of section 229 of the Criminal Code."

It is true that there is required under The Gaming and Betting Act, 1942, a closing order based upon some earlier breach of some one of the enumerated sections of The Criminal Code, and it is the violation of the order that is made the offence. But the act that violated the closing order, and exposed the registered owner and others to imprisonment, was already made a criminal offence by the Code. While the scope of the two statutory enactments is not in every particular identical, they deal with the same conduct and make it an offence, and prescribe punishment. The Criminal Code and The Gaming and Betting Act, 1942, in so far as the latter provides for such an order as that of 18th May 1944, in their pith and substance relate to the same subject matter, and both statutes deal with it as crime.

Reference was made in argument to the case of *Bédard v. Dawson and The Attorney-General for Quebec*, [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 412, where a statute of the Province of Quebec was in question, and was held to be *intra vires* the Provincial Legislature. That statute, however, was essentially different in several respects from the statute here in question. It was held that it was not criminal law, but was concerned exclusively with the control and enjoyment of property, and the safeguarding of the community from the consequences of an illegal and injurious use being made of it. The Quebec statute was directed to the closing of the premises for all purposes. The procedure for the enforcement of the closing order was that provided by the Code of Civil Procedure respecting injunctions. It created no offence.

The Quebec statute was held to relate to property and civil rights within Provincial jurisdiction.

I have not overlooked the fact that, notwithstanding the jurisdiction assigned to the Dominion Parliament in relation to criminal law, by s. 91(27) of The British North America Act, the Provinces have also a limited jurisdiction to enact criminal law. See *Rex v. Nat Bell Liquors, Limited*, [1922] 2 A.C. 128, 65 D.L.R. 1, 37 C.C.C. 129, [1922] 2 W.W.R. 30, per Lord Sumner at p. 167 [A.C.], and *Chung Chuck v. The King*, [1930] A.C. 244, [1930] 2 D.L.R. 97, 53 C.C.C. 14, [1930] 1 W.W.R. 129, per Lord Sankey L.C. at p. 254 [A.C.]. Clause 15 of s. 92 of The British North America Act assigns to the Province legislative jurisdiction in relation to the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matters coming within any of the classes of subjects enumerated in this section.

It may well be that much might be done under The Gaming and Betting Act, 1942, that the Provincial Legislature could authorize. Orders might be made that would not trespass upon the field of criminal law within the exclusive jurisdiction of the Dominion Parliament. But the order here in question, if read into The Gaming and Betting Act, 1942, forbids, in the plainest terms, and constitutes as offences punishable by imprisonment, acts that are already dealt with as crimes by The Criminal Code. The imposition of punishment by ss. 7 and 8 of the Provincial statute is, therefore, for enforcing a law in relation to a matter of criminal law already the subject as such of legislation by the Dominion Parliament.

Counsel for the appellant having asserted that The Gaming and Betting Act, 1942, furnishes the authority for the closing order of 18th May 1944, and that being essential to the success of his appeal, it is not necessary to discuss at length the question whether the statute is not capable of another interpretation that may give another aspect to the question of the validity of the statute, but equally fatal to the conviction, because the closing order would be left without the support of the statute. It will be sufficient for present purposes to indicate briefly another view of the statute that, in my opinion, has much to support it.

It is a well-established principle in the construction of statutes that where their meaning is doubtful, that construction is to

be preferred that will make for the validity of the statute, rather than a construction according to which the statute will be invalid. Having regard to this statute as a whole, it may well be considered that the only purposes for the use of which the Legislature intended that an order might be made to close the premises, must be lawful purposes—such uses as it would be the right of an owner or occupant to put the premises to. With that limitation the statute might be considered to be legislation in relation to property and civil rights within clause 13 of s. 92 of The British North America Act, and the penal sections as within clause 15 of the same section. The order would, in such case, of necessity omit any reference to the sections of The Criminal Code enumerated in the closing order here in question, and the violation of the order could not be established by such evidence as supported the conviction now in question. This appeal would still fail therefore. I refer to the provisions of ss. 3(2), 4(3) and 5 as possibly indicating that the Legislature did not intend that the closing order under s. 2 should itself forbid infractions of the sections of The Criminal Code so that s. 8 would apply to them. The statute might, upon the construction I suggest, be deemed “to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime”, to use the words of Duff J. (afterwards Chief Justice) in *Bédard v. Dawson*, *supra*.

For the reasons I have given, I would dismiss the appeal.

GILLANDERS J.A. agrees with ROBERTSON C.J.O.

MCRUER J.A. (*dissenting*): The sole question for determination in arriving at a decision as to the constitutional validity of the statute in question is whether the legislation is in essence legislation concerning property and civil rights or criminal law. Subs. 1 of s. 2 is the governing section of the Act. It reads as follows:

“The Attorney-General or any other person may apply to the court by originating notice of motion for an order closing any place with respect to which a conviction has been made within the preceding three months under section 228, 229, 230 or 235 of the *Criminal Code* (Canada), against its use for all or any purposes for any period not exceeding one year.”

The others sections either are of a procedural character or provide for means of enforcing the order of the Court. Provision

is made for a notice of motion for an order closing the premises and that a certified copy of a conviction of a person in respect of any place under s. 228, 229, 230 or 235 of The Criminal Code shall be *prima facie* evidence that the place therein described was the place with respect to which the conviction took place. An order closing any place may be suspended on the application of an owner or other person, upon his establishing his good faith and his ignorance of the use of the place for the illegal purpose, and upon his furnishing a bond that the place will not be used in contravention of the enumerated sections of The Criminal Code during the term of the order.

Provision is also made for limited occupancy of the premises during the term of an order for the purpose of protecting the premises. Section 7 provides that where an order is made under the Act closing any place, and such place is used in violation of the order, the registered owner and any person found in such place while it is being so used shall be deemed to have violated the order, unless the latter proves that he was on the premises for a lawful purpose. Section 8 provides for penal sanctions for any one who violates the provisions of the Act or any order made thereunder.

If the subject matter of the legislation is otherwise within the competency of the Provincial Legislature, provisions for penal sanctions under ss. 7 and 8 do not bring the legislation within the realm of criminal law: *Toronto Railway Company v. The City of Toronto*, [1920] A.C. 446 at 452, 51 D.L.R. 69, 32 C.C.C. 243, 25 C.R.C. 310, [1920] 1 W.W.R. 755; *Hodge v. The Queen* (1883), 9 App. Cas. 117 at 133, C.R. [9] A.C. 13, 3 Cart. 144; see also *Reg. v. Boardman* (1871), 30 U.C.Q.B. 553, 1 Cart. 676.

Sections 225, 226 and 227 define three types of disorderly houses which are prohibited by The Criminal Code. At common law "all gaming houses are nuisances in the eye of the law, not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood": 4 Bac. Abr. 18; *Rex v. Rogier and Humphrey* (1823), 1 B. & C. 272, 107 E.R. 102.

Section 228 of The Criminal Code makes it a summary offence to be found in any disorderly house without lawful

excuse and for anyone who as landlord, lessor, tenant, occupier or agent has charge or control of any premises and *knowingly* permits such premises or any part thereof to be used for the purpose of a disorderly house.

Section 229 provides that the keeper or an inmate of a disorderly house is guilty of an indictable offence and that if the landlord, lessor or agent of premises in respect of which any person has been convicted as keeper of a common bawdy house fails, after such conviction has been brought to his notice, to exercise any right he may have to determine the tenancy or the right of occupation of the person so convicted, and subsequently any such offence is again committed on the premises, the landlord, lessor or agent shall be deemed to be a keeper of a common bawdy house unless he proves that he has taken all reasonable steps to prevent a recurrence of the offence.

Section 230 makes it an offence to obstruct a constable authorized to enter a disorderly house, and for an owner or person in control of premises used as a disorderly house *knowingly* to allow any contrivance to remain on the premises for the purpose of obstructing or delaying the authorized entry of a constable.

Section 235 makes it an indictable offence to use or *knowingly* allow any premises to be used for the purpose of registering bets, etc., and engaging in pool-selling, except under certain conditions at authorized race tracks.

I have dealt with the sections of The Criminal Code governing disorderly houses at some length, to indicate the character of the criminal legislation in force in Canada and the extent to which the field has been covered either in The Criminal Code or by common law. It will be observed that the criminal law has to do with the regulation and control of the conduct of individuals by penalizing the individual if he knowingly participates in the activities made criminal. The scheme of The Criminal Code has as its object the repression of immorality considered as a public wrong, and its provisions are enforced by the punishment of offenders.

In considering the constitutional validity of a statute it is of primary importance to determine its essential purpose. It is also important to bear in mind that the provisions of a statute are capable of being viewed in two different aspects, according

to one of which they appear to fall within the subjects assigned to the provincial parliament by s. 92 of The British North America Act, whilst, according to the other, they clearly belong to the class of subjects exclusively assigned to the legislature of the Dominion by s. 91: *Union Colliery Company of British Columbia, Limited v. Bryden*, [1899] A.C. 580 at 587, C.R. [12] A.C. 175.

Section 2 of the impugned Act is not designed to punish individuals who knowingly take part in the operation of a disorderly house, but, as I view it, it is designed to prevent the use of premises for the purpose of a disorderly house. It has to do with the user of real property, and not with the behaviour of individuals. It is a matter of concern to the Province, and within its power, to protect adjacent property-owners against the nuisance that is created in the neighbourhood and the attendant detriment to property values by the presence of a disorderly house in a community. It is clear that in many cases it may often be difficult to apprehend and punish the individual against whom the provisions of The Criminal Code are directed, and that the punishment of the individual by fine and imprisonment may do little to remove the nuisance where this form of vice has become established at a particular location.

The Provincial Act places on the registered owner of premises and persons found therein the responsibility of seeing that this form of public nuisance is not continued on premises in respect of which a closing order has been made following a conviction for the named offences. It may well be that in some cases this may be a great hardship, especially where the registered owner has no property interest in the premises and no control over them. These are matters for the consideration of the legislators, and not for this Court. If the subject matter is within the legislative competence of the Legislature, it is not for the Court to pass on the manner in which that power is exercised.

I have come to the conclusion that the reasoning in the judgments in *Bédard v. Dawson and the Attorney-General for Quebec*, [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 412, in reference to a statute passed in the Province of Quebec, applies equally to the statute here in question. It is true that, in the Quebec statute, the method of legislative approach was different, but I think the result, in so far as it affects the constitutional validity of the Act, is the same.

The Quebec statute applies to disorderly houses within the meaning of Part V of The Criminal Code. It is declared that it is illegal for any person who owns or occupies a house or building to allow it to be used as a disorderly house. The procedure adopted for restraining the use of the premises as a disorderly house is by way of an application for an injunction "directed to the owner, lessor, lessee or occupant of such building, or to all such persons, restraining them, their heirs, assigns or successors from using or permitting the use of such building or any other building for the purposes above-mentioned," (*i.e.*, as a disorderly house within the meaning of Part V of The Criminal Code.)

If the judge to whom the application is made finds that the use of the building continues as a disorderly house, he shall, in addition to all other orders he is by law empowered to make, order the closing of the building for any purpose whatsoever for a period of not more than one year. The Quebec Act differs from the Ontario Act in four essential details: (1) It declares that it is illegal for any person who owns or occupies a house to use or allow it to be used as a disorderly house; the Ontario Act does not contain any such general provision. (2) An owner or occupier may be restrained by injunction from permitting the premises to be used as a disorderly house within the meaning of Part V of The Criminal Code; there is no provision for an injunction in the Ontario Act. (3) The Court may make an order closing the premises for *any purpose whatsoever* for one year; under the Ontario Act the order of the Court may be that the premises be closed for *any or all* purposes. (4) The method of procuring obedience to the Court's order under the Ontario Act is by way of penal sanctions, while under the Quebec Act it must ultimately rest in the authority of the Court to commit for disobedience of the Court's order.

The reasons for judgment of the learned judges in the Supreme Court make it clear that it is within the power of the Province to pass legislation to prevent the continued use of the property as a disorderly house, notwithstanding that the criminal law provides for the punishment of persons who knowingly permit the use of the same property as a disorderly house. At p. 683, Idington J. deals with the suggestion that the provincial Act adds a further penalty to that which is provided by The Criminal Code, and at p. 684 the learned judge holds that it is within the

power of the Legislature of the Province to legislate to prevent crime, and that it is the duty of the Legislature to protect neighbouring property-owners in such cases as are dealt with by the Act. Duff J., at p. 684, states: "The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate. I think the legislation is not invalid."

Anglin J., for reasons stated by Greenshields J. in the Court of King's Bench, was of the opinion that the statute was "concerned exclusively with the control and enjoyment of property and the safeguarding of the community from the consequences of an illegal and injurious use being made of it".

Brodeur J. had doubt as to whether the federal Parliament could pass a law providing for the closing of a disorderly house and considered that there was jurisdiction in the federal Parliament to provide for the punishment of those responsible for the nuisance, and in the Provincial Legislatures to authorize an injunction to put an end to the violation of the public law. He held that the co-operation of the two legislative powers is desirable in such a case. Mignault J. observed that the legislation "does not punish the offence itself by fine or imprisonment. It merely legislates concerning the possession and use of an immovable."

In the Quebec Court of Appeal (33 Que. K.B. 246, 39 C.C.C. 175) Greenshields J., in cogent reasoning, emphasizes a very fundamental distinction between the provincial law and the criminal law. Under the criminal law there must be a capacity to commit the offence, and also the intention. Under the provincial law neither is required. It is pointed out that a house owned by an insane person, or a child under seven years of age, might be ordered closed. He states "What it purports to do, and what it does, is to declare the civil effects resulting from the commission of a crime within premises owned by a person who commits no crime whatever."

It may be that the owner and convicted person are sometimes one and the same person, and in that case the convicted person may, in addition to being punished under the criminal law, suffer by having his property closed, but that does not affect the right of the Legislature to deal with the property that has been used and may likely continue to be used for criminal purposes.

Does the fact that the Ontario legislation provides for an order closing the premises against its use for "all or any purposes", as distinct from the provision of the Quebec statute for closing premises for "any purpose whatsoever" affect the constitutional validity of the statute? I think not. The essential purpose of the legislation is the same.

If this is true, I think the order, worded as it is, closing the premises "against its use for all purposes except as a private residence, including the right of keeping boarders and carrying on any business which may sometimes be properly carried on in a private residence, but in so using the said property, no violation of Sections numbers 228, 229 and 235 of the Criminal Code shall be carried on in the said premises" is an order validly made within the power conferred by the statute which gave to the judge power to close the premises for "all or any purposes".

If the Act is *intra vires*, I do not think the order is *ultra vires* because the premises are ordered to be closed for uses which include use in violation of ss. 228, 229 and 235 of The Criminal Code.

I cannot find any constitutional distinction between the power conferred upon the Court under the Quebec statute to grant an injunction restraining "the owner, lessor, lessee or occupant of such building, or . . . all such persons . . . from using or permitting the use of such building or any other building for the purposes above-mentioned" (*i.e.*, as a disorderly house), and the power conferred on the judge under the Ontario statute to make an order closing any place with respect to which a conviction has been made under ss. 228, 229, 230 and 235 of The Criminal Code against its use in violation of those sections. It may be that an effect of the order, among others, is to forbid the use of the premises as a disorderly house and thereby to forbid the commission of a crime therein, but that is precisely the power conferred on the Court under s. 4 of the Quebec statute. The procedure is different, it is true. Under the Quebec procedure the order of the Court must necessarily be enforced by committal, while under the Ontario statute it is by the imposition of fine or imprisonment. This does not, in my opinion, affect the validity of the statute.

With great deference. I have come to the conclusion that the subject of the legislation, viewed in its aspect as "suppressing

conditions calculated to favour the development of crime" and as "the safeguarding of the community from the consequences of an illegal and injurious use being made of" property, to the detriment of neighbouring property, is within the competency of the Provincial Legislature, and that the statute is not *ultra vires*.

I agree that the defence of *autrefois convict* is not made out. I would therefore allow the appeal and remit the case to the County Judge for a proper disposition.

Appeal dismissed, MCRUER J.A., dissenting.

Solicitor for the Attorney-General for Ontario, appellant:
C. R. Magone, Toronto.

Solicitor for the respondent: N. J. Riordan, Windsor.

[KELLY J.]

Rex v. Hyatt.

Criminal Law—Having Care or Control of Motor Vehicle while Intoxicated—Mens rea—Accused in Drunken Stupor—The Criminal Code, R.S.C. 1927, c. 36, s. 285(4), as re-enacted by 1930, c. 11, s. 6.

Section 285(4) of The Criminal Code, as re-enacted in 1930, contains an absolute prohibition against any intoxicated person either driving an automobile or having the care or control of it. It follows that *mens rea* is not an ingredient of an offence under the subsection, and that an accused person found sitting in a drunken sleep in a motor vehicle, with the keys in the lock and the ignition turned on, is guilty of an offence, even where there is no evidence that the accused attempted to set the vehicle in motion after becoming intoxicated, and he himself swears that he had no intention of driving, and got into the vehicle only to sleep. *Rex v. Forbes*, [1943] O.W.N. 96; *Rex v. Armstrong* (1943), 80 C.C.C. 322, disapproved; *Rex v. Crowe* (1941), 16 M.P.R. 101, agreed with; *Rex v. Butler*, [1939] 3 W.W.R. 433, discussed.

AN APPEAL by stated case from an acquittal by a magistrate.

12th January 1945. The appeal was heard by KELLY J. in chambers at Toronto.

C. R. Magone, K.C., for the informant, appellant.

M. Lerner, for the accused, respondent.

5th July 1943. KELLY J.:—This is an appeal by way of a stated case under s. 761 of The Criminal Code, R.S.C. 1927, c. 36, from the acquittal of the accused by Police Magistrate D. B. Menzies of the city of London, on an information charging that "Leonard Hyatt . . . on the 14th day of October, 1944, at the

City of London, . . . was in control of motor vehicle license number 37-844C, on Adelaide Street near York Street, while intoxicated, contrary to section 285-4 of the Criminal Code."

The facts set forth in the stated case are shortly as follows: On 14th October 1944, at 4.05 p.m., the accused was found by a police officer slumped over the steering-wheel of a motor truck which was parked beside the curb on Adelaide Street, in the city of London. The keys of the ignition lock were in the lock and the ignition was turned on. The accused was asleep and when he was awakened by the officer he was found to be intoxicated and was described by the police officer as being helplessly drunk. The accused was the only person in the truck, but there was no evidence that the accused had moved his motor truck while he was intoxicated. The accused gave evidence in his own behalf and stated he was employed by a farmer on a farm outside the city of London. He stated he had driven the motor truck to London for the purpose of seeing a veterinary surgeon concerning a sick horse; that he was unable to find the veterinary surgeon and he went into a beverage room and had some beer. In the beverage room he met another man and together they drove to the other man's residence on Adelaide Street, near which he was found by the police officer. The accused left the truck parked and went into the other man's residence, and as a result of consuming liquor therein he became intoxicated. The other man left the premises and the accused, having no place to go, decided he was not fit to drive the truck, and stated that he had no intention of so driving, and got into the truck for the purpose of sleeping.

The magistrate found the accused helplessly drunk, and, deciding that the facts as disclosed in the evidence were almost identical with the facts in the case of *Rex v. Forbes*, [1943] O.W.N. 96, 79 C.C.C. 116, [1943] 1 D.L.R. 683, which he had tried and in which he had found the accused guilty, but in which case on appeal to His Honour Judge Grosch the conviction was quashed, he felt himself bound by the latter decision, and dismissed the charge against the accused Hyatt.

The stated case submits two questions of law,

"(a) Was I right in finding that mens rea or that element of intent and/or knowledge is an essential element of the offence?

“(b) Was I right in finding that the accused did not have the care or control of the motor vehicle in question within the meaning of section 285-subsection 4, of the Criminal Code?”

Subs. 4 of s. 285 of The Criminal Code, as re-enacted by 1930, c. 11, s. 6, is as follows:

“(4) Driving while Intoxicated. Every one who, while intoxicated or under the influence of any narcotic, drives any motor vehicle or automobile, or has the care or control of a motor vehicle or automobile, whether it is in motion or not, shall be guilty of an offence. . . .”

The section deals with two alternative offences, namely, driving a motor vehicle while intoxicated and having the care or control of a motor vehicle while intoxicated.

In the present case the accused is charged with having the care or control of a motor vehicle while intoxicated. The learned magistrate found as a fact that the accused was intoxicated. It therefore remains for consideration whether the accused had the care or control of the motor truck.

I take the meaning of “control of a motor vehicle” to be having the means of setting the motor vehicle in motion, that is, being in such a position that he could make the motor vehicle move as he pleased. This presupposes that the motor vehicle is mechanically capable of being set in motion. In the present case the accused had been driving the motor truck and had parked it for his convenience in making calls, and, according to the facts as stated in the stated case, I think it can be assumed that the motor vehicle was mechanically capable of being set in motion.

The first question of the stated case asks if *mens rea* is an ingredient of the offence. The learned magistrate in his decision found the accused helplessly intoxicated and that the accused was in such a condition that he could not, at the time he was arrested, because of his intoxication, put the truck in motion and therefore could not be said to be in control of the truck. The learned magistrate also felt himself bound by the decision in *Rex v. Forbes*, *supra*.

Another case in our courts, *Rex v. Armstrong*, 80 C.C.C. 322, [1944] 1 D.L.R. 233, a decision of the County Court Judge of the County of Peterborough, also followed the reasoning in *Rex v. Forbes*, and concluded that in order to be convicted under s. 285(4) of the Code, the accused must have a consciousness or

awareness that he had the care or control of the motor vehicle. In *Rex v. Forbes*, the learned County Court Judge reviewed the decisions in the various Provinces dealing with *mens rea* as applied to offences under s. 285(4) of the Code, and referred, as did Harvey C.J.A. in *Rex v. Butler*, [1939] 3 W.W.R. 433 at 435, 73 C.C.C. 86 at 89, [1939] 4 D.L.R. 592, a decision of the Appellate Division of the Supreme Court of Alberta, to Russell on Crime, 9th ed., 1936, p. 45:

" . . . 'the full definition of every crime contains expressly or by implication a proposition as to a state of mind,' and, if that mental element is proved to be absent in any case, the crime so defined is not committed. A late and it would seem a perfectly correct statement of the law on this subject is: 'There is a presumption that *mens rea*, a knowledge of the facts which render the act unlawful, is an essential ingredient in every criminal offence'." Grosch Co. Ct. J. continues: "The author continues by pointing out that there may be prohibited acts which, by the enactments prohibiting them, are criminal without *mens rea*, but he adds that: 'Few, if any, such enactments relate to indictable offences, and usually they prohibit certain acts in the interests of the public revenue or private property'."

Harvey C.J.A., in *Rex v. Butler*, at p. 89 (C.C.C.), states:

"The accused was unconscious and so incapable of intention or even knowledge and incapable of physical action and while that condition was no doubt due to drunkenness that is of no consequence for the determination of the question whether he had the care or control of the car. It would be no different in this regard if his condition had been caused by a paralytic stroke.

"Surely the control which the subsection contemplates is one which is capable of being exercised and so becoming a menace to public safety but in the case under consideration the appellant at the time to which alone the evidence relates was no more capable of exercising any control than if he had been completely paralyzed. Moreover, being unconscious he could have no knowledge or state of mind which Russell states to be an essential ingredient of crime."

I note that Ford J.A., one of the judges composing the Court that decided *Rex v. Butler*, did not agree with the reasoning of Harvey C.J.A., although he agreed with his conclusion. Ford J.A., at p. 90 (C.C.C.) states:

"I have had the advantage of reading the reasons for judgment of the Chief Justice, in which the salient facts are stated, and I concur in the result arrived at by him.

"I am, however, unable to agree with the proposition that a man sitting at the wheel of a motionless motor car capable of being driven, so drunk as to be incapable of any physical or mental effort can under no circumstances be said to have the care or control thereof, nor do I understand the Chief Justice definitely so to hold. For example, if the owner of an automobile, capable of being put into motion by the usual means, had, before becoming physically and mentally incapacitated, managed to get himself into the car, even though he had not, before his incapacity had become complete, attempted to operate it, I think he could be found guilty of having its care or control and that whether when he so got himself therein he was sober or only partially intoxicated."

The doctrine of *mens rea* had greater application in earlier times and especially with prosecutions under the common law. With the advance of statute law the tendency is to look at the object of the legislation to determine what was intended, and the doctrine of *mens rea* is somewhat restricted in its application to prosecutions under the statutes. The result of all the cases dealing with *mens rea* is best expressed in the words of the author of Craies on Statute Law, 4th ed. 1936, p. 462:

"Upon the principles thus laid down there seems to be general judicial agreement, and the whole difficulty arises on their application to particular definitions of offences; *i.e.*, in deciding whether the statute prohibits absolutely the acts defined as constituting an offence, or whether the prohibition is to be read with the common law qualification. The application must in every case turn on the wording of the particular enactment, or, in case of ambiguity, upon the governing intention of the Act in which it is contained, or the set of Acts relating to the subject-matter. And decisions on particular statutes are consequently of value only when they are *in pari materia* with the enactment under discussion, or are drawn in the same terms as that under review."

In a leading case on *mens rea*, *Reg. v. Tolson* (1889), 23 Q.B.D. 168, Wills J. states, at pp. 172-3:

"Although *primâ facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible

rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. . . .

"Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable."

In a case in our courts, *Rex v. Stewart*, [1940] O.R. 178 at 181, 73 C.C.C. 141 at 144, [1940] 1 D.L.R. 689, Robertson C.J.O. says:

"It is no doubt the general rule that to constitute an offence against a penal statute or regulation there must be a guilty mind—not necessarily an intention to commit the very offence charged, but at least an intention to do a wrong or to break the law. This rule is not, however, an absolute one. There are exceptions to it. Some of them are cases where a master has been held responsible under a penal statute for the acts of a servant. See *Coppen v. Moore*, [1898] 2 Q.B. 306. There are also cases where laws have been made for the protection of the public health or safety or general welfare, and it has been held that their subject matter and purpose and scope are such that to confine their prohibitions and penalties to cases where there is *mens rea* would defeat their object. For example, when a butcher was prosecuted for exposing for sale diseased meat contrary to the provisions of The Public Health Act, it was held that it was no defence that he did not know the meat was diseased. The object of the Act was that people should be protected from the danger of eating what is unfit for food, and that danger is not mitigated by ignorance or lack of evil intent on the part of the vendor; *Hobbs v. Winchester Corporation*, [1910] 2 K.B. 471. Numerous illustrations of the application of the principle are to be found in the cases cited in that decision. As was said by Stephen J., in *Cundy v. Le Cocq* (1884), 13 Q.B.D. 207 [at p. 210], 'the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created.' It has also been held that to publish matter that tends to corrupt the

morals of the public is not justified by the fact that the purpose of the publisher was meritorious. *Steele v. Brannan* (1872), L.R. 7 C.P. 261; *R. v. St. Clair* (1913), 28 O.L.R. 271, 12 D.L.R. 710, 21 C.C.C. 350."

Now, considering s. 285 of The Criminal Code in the light of the decisions, I feel that the framers of the section intended to distinguish between the offences therein charged, and it is significant that we find in some of the subsections words denoting that knowledge or intention is an ingredient to be considered in prosecutions under the section. Subs. 1 includes the word "wilful", subs. 2 the words "with intent", and subs. 3 those "with intent". Subss. 4 and 5 have no such words.

The fact also that subs. 4 contains the words "whether it is in motion or not", referring to the motor vehicle, must be given some significance.

It is quite notorious that the effect of intoxicants upon the human mind is to stimulate one's passions and increase one's confidence in oneself, while it actually dulls the senses and renders the mind of the drinker less responsive to danger and his faculties slower to react on impulses. As the operation of a motor vehicle, because of its great momentum and the speed with which it can be operated, is a potential danger to the public, and especially so in the hands of an intoxicated person, I believe that Parliament, in passing s. 285(4) of the Code, intended absolutely to prohibit intoxicated persons being in control of motor vehicles.

A person in charge or control of a motor vehicle which he intends to operate should, before partaking of any intoxicants, arrange to transfer such control to another who is capable of assuming such control, and divest himself of the means of such control. If he fails to take such precaution and partakes of intoxicants he thereby undertakes the risk of prosecution under s. 285(4) of the Code, and in that sense *mens rea* or knowledge or awareness might be said to apply to the offence.

In the present case the accused, according to his own evidence, was able to get into the front seat of his motor truck and was apparently able to insert the ignition key in the ignition lock of the truck and turn the ignition on, although he stated he got into his truck to sleep. It is quite evident that he was in a position to control the movement of the truck, except for the degree of his intoxication that would render a driver incapable of

controlling his movements, and I cannot believe that it was ever intended to put a premium on that degree of intoxication that would render a driver totally incapable of controlling his movements. Such a condition of stupor would be a potential danger to the public, because such a driver on being aroused is likely to attempt to operate the vehicle, which admittedly would be an offence against the section.

I am of the opinion, for the reasons herein stated, that Parliament in wording s. 285(4) of the Code as it stands, intended it as a total prohibition, and that some words denoting the state of mind or intention of the accused should not be read into the section. In other words I feel that *mens rea* is not a necessary ingredient of the offence charged under the section.

I have examined the decision in the case of *Rex v. Crowe*, 16 M.P.R. 101, 76 C.C.C. 170, [1941] 4 D.L.R. 82, a decision of the Nova Scotia Supreme Court on an appeal from the decision of a stipendiary magistrate, and I may say that I am in agreement with the reasons and conclusions arrived at in that case.

The questions stated by the learned magistrate must be answered in the negative and the matter will therefore be remitted to the magistrate to be dealt with in accordance with this opinion.

I am making no order as to costs.

Appeal allowed.

Solicitor for the informant, appellant: Claude C. Savage, London.

Solicitor for the accused, respondent: M. Lerner, London.

[HOGG J.]

Re Branchflower.

Wills—Legacies—Death of Legatee before Testator—Special Statutory Provision against Lapse—Construction—Date as of Which Heirs of Deceased Legatee to be Ascertained—The Wills Act, R.S.O. 1937, c. 164, s. 36.

Section 36 of The Wills Act, which provides that where there is a legacy to a child or other issue, or brother or sister, of the testator, and the legatee predeceases the testator, the legacy shall not lapse, but shall take effect as if the legatee had died immediately after the testator, is designed solely to prevent the lapse of legacies in such circumstances, and has no further effect. The persons entitled to the legacy must therefore be ascertained as of the date of the legatee's death, and not as of the date of the testator's death. *Re Hurd; Stott v. Stott*, [1941] 1 All E.R. 238, followed; *In re Allen's Trusts*, [1909] W.N. 181, not followed.

A MOTION for the advice and direction of the Court.

31st May 1945. The motion was heard by HOGG J. in Weekly Court at Toronto.

L. M. Ball, for the executors.

C. M. Milton, for Stella Skaris.

W. B. Williston, for Charles H. McGovern and the personal representative of the estate of Fern McGovern.

P. D. Wilson, K.C., Official Guardian, for infants.

19th July 1945. HOGG J.:—This is an application made by the executors of the last will and testament of the late George Arthur Branchflower, deceased, for an order determining certain questions arising as to the construction and interpretation of his will.

Mr. Branchflower died on the 25th September 1944. By the terms of his will, a pecuniary legacy amounting to the sum of \$500 was bequeathed to Clara Alberta Brenton, a sister of the testator, and he also bequeathed three-quarters of the residue of his estate to his four sisters, including the said Clara Brenton. Clara Brenton died intestate on the 27th May 1939, leaving as her next-of-kin her husband, Clifford L. Brenton, and two daughters, Stella Skaris and Fern J. McGovern. The said Clifford L. Brenton died intestate on the 5th October 1939, his heirs being Fern McGovern and Stella Skaris aforesaid. Fern McGovern died on the 2nd February 1941, having made a will under which her husband and her two children, Lois May McGovern and Charles Francis McGovern were beneficiaries.

The matter before the Court resolves itself into a very neat point, and involves the interpretation and meaning of s. 36 of

The Wills Act, R.S.O. 1937, c. 164, which section provides, in substance, that when real or personal estate is devised or bequeathed to a child or other issue or brother or sister by a testator, the gift will not lapse by reason of the death of the beneficiary in the lifetime of the testator. In the present case Mrs. Clara Brenton died five years before the testator.

The question which presents itself for solution is whether those entitled to the benefits bequeathed to Clara Brenton shall be those in existence at the time of her death in 1939, or those in existence at the time of the testator's death in 1944. When Clara Brenton died in 1939, her next-of-kin were her husband and her two daughters. If she is deemed to have died in 1944, those entitled to the estate of Clara Brenton were her daughter Stella Skaris and her two grandchildren, the daughters of Fern McGovern, deceased.

A rather curious circumstance arises with reference to the decisions of the courts in England upon the point in issue, and two diametrically contrary dispositions of the question are to be found. Jarman on Wills, 7th ed. 1930, at p. 425, discusses the effect of s. 33 of the English Wills Act, which corresponds to s. 36 of our Act. He says that the effect of the section is to prolong the life of the original devisee or legatee by a fiction for a particular purpose; that purpose is to give effect to the will containing the gift which would otherwise lapse, and it only points out the mode in which that effect is to be given. In *Eager v. Furnivall* (1881), 17 Ch. D. 115, the section of the statute in question was considered by Jessel M.R. He referred to *Johnson v. Johnson* (1843), 3 Hare 157, 67 E.R. 336, and quoted the language of Wigram V.C. who, in discussing s. 33, said, "A legatee within that section would take the same provision under his father's will, and with the same powers and incidents of property, as if he had actually survived the testator." In commenting upon the pertinent section of the statute, Jessel M.R. said, at p. 119: "It put his [the legatee's] death a day after the other testator's death, and, therefore, if it was to take effect as if his death had happened immediately afterwards, it took effect with all its incidents, and among other incidents was the right to dispose of the property he was entitled to at the time of his death by his will."

A much later case with reference to the same subject is that of *In re Allen's Trusts*, [1909] W.N. 181, in which the judgment was delivered by Neville J., who, in considering the section in question of the Wills Act, held that, for the purposes of the bequest, the legatee under the testator's will, who died many years before the testator, must be deemed, under the statute, to have died immediately after the death of the testator, and her next-of-kin must be ascertained as of that date. She had two children living, and these were her next-of-kin. This case purported to follow an older one of *In the Goods of Mary Councill* (1871), L.R. 2 P. & D. 314.

There next follows a case of recent date, that of *Re Hurd; Stott v. Stott*, [1941] 1 All E.R. 238, in which the interpretation of s. 33 of The Wills Act, 1837, was considered by Farwell J., a judge of much distinction. It is interesting to note that the judgment does not refer to any past judgments or opinions, and it would appear as if the conclusion arrived at by the learned judge was founded entirely upon his own view of the matter. It is directly contrary to the view expressed in the case of *In re Allen's Trusts*, and Farwell J. decided that the estate of the deceased beneficiary must be administered according to the law in force at the date of the death of the legatee, and not the law in force immediately after the death of the testator. In the *Hurd* case the testatrix died in 1939. Her daughter died intestate in 1923, and had issue living at the time of the death of the testatrix, so that she must be treated, for the purpose of the statute, as having died immediately after the death of the testatrix. Farwell J. said, at p. 240: "The section provides that the gift is not to lapse, but is to take effect as if the death of such person had happened immediately after the death of the testator. If one treats those words quite literally, one must assume that the lady survived and then died immediately after the death of the testatrix in 1939, and the effect must be that the estate must be administered according to the law in force at that date—namely, at the date when she is deemed to have died. In my judgment, however, that is not really the true effect of this section. The effect of the section is to prevent lapsing in this particular case" And again, at p. 241, Farwell J. said: "On the whole, I have come to the conclusion that this section does not apply beyond providing for the prevention of

the lapse The Act does not, in my judgment, apply so as to alter the way in which the existing estate should be disposed of. It only operates so as to increase that estate and does not change the persons who were entitled to the estate under the law which was in force at the time of the intestate's death."

In the case of *Re McCallum* (1924), 27 O.W.N. 169, the same section of the Act was under consideration. The judgment of Lennox J. is not helpful, and merely states that the gift takes effect immediately after the death of the testator, and may be disposed of by the donee in anticipation.

There is, I think, much force in the reasoning of Farwell J. in the *Hurd* case, and after some hesitation I have reached the conclusion that his judgment should be followed rather than those in the older cases. It seems to me that the object and purpose of s. 36 of The Wills Act is solely to prevent a lapse and that this "was the mischief and effect for which the Common Law did not provide." The fiction by which the legatee is presumed to have died immediately after the death of the testator is, I think, for the purpose alone of enabling the gift to take effect and I do not think that the Legislature contemplated that the section would have the effect that there might be two bodies of heirs or next-of-kin, those who existed at the actual death of the legatee and those (who might be different persons) who were in existence immediately after the death of the testator. This would be the result in certain cases if the section embraces more than the prevention of a lapse. Farwell J. comments on this possibility in his judgment.

The language used by Jarman, which I have referred to, would seem to agree with this interpretation when he says the fiction is for "a particular purpose".

Wigram V.C. quoted by Jessel M.R. in *Eager v. Furnivall*, *supra*, also speaks of the legatee taking with "the same powers and incidents of property, as if he had actually survived the testator."

The powers and incidents pertaining to property are what are referred to, not the succession to such property.

At the time of the death of Clara Brenton in the year 1939 she left surviving her husband Clifford Brenton and her two daughters. The husband and one of the daughters died before the testator. The legacy in question left to Clara Brenton by

her brother should go to such persons, or the personal representatives of such persons, as would have been entitled had it been available at the time of her death.

The costs of all parties should be out of the estate, those of the executor as between solicitor and client.

Order accordingly.

Solicitors for the executors: Calder & Ball, Woodstock.

Solicitors for Charles McGovern: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.

Solicitor for Stella Skaris: D. J. Walker, Toronto.

[GREENE J.]

Re Gemmill.

Trusts — Validity — Municipality as Trustee — Powers of Municipality — Public Park—Other Duties—The Municipal Act, R.S.O. 1937, c. 266, ss. 267, 404(46)—The Mortmain and Charitable Uses Act, R.S.O. 1937, c. 147, s. 8(2)(a)—The Public Health Act, R.S.O. 1937, c. 299, s. 113.

A testatrix (resident in England) devised property to her Canadian trustees "upon trust for the Almonte, Ontario Town Council to be applied" (a) as to property in Almonte, for the construction and maintenance of a public park, and (b) as to other real property in various parts of Ontario and in Manitoba "for the purpose of establishing on these properties a Slaughter House or Slaughter Houses in which there shall be carried out the humane slaughtering of animals and with the object of carrying on and promoting and furthering in Canada the work of" an English Association for the promotion of humane methods of slaughter, and as to her personal estate "to be used for the purpose of promoting and furthering in Canada the work of the said Association". By a later clause (7), she provided that should these trusts fail the Canadian estate should be transferred to her English trustees "upon trust for [the Association] absolutely for the purposes of the Association".

Held, (1) the words "the Almonte, Ontario Town Council" should be interpreted as meaning the municipal corporation of Almonte. *Williams v. Roy et al.* (1885), 9 O.R. 534, applied.

(2) the trust set out as (b) above failed. It was clearly the intention of the testatrix that at least one slaughter house should be established on each of the properties, and the municipality had no power to erect slaughter houses except within its own limits or in an adjoining municipality. No power was given to sell some of the properties and use the proceeds for the erection of a slaughter house elsewhere. Further, the personal estate was to be used to promote and further the work of the Association, which was work of an educational nature, and the Town had no power to accept a trust for such a purpose.

(3) although, taken by itself, the trust designated as (a) was valid, yet the whole will indicated that the testatrix intended the two trusts to be taken together as a single scheme, and they were not severable. The Canadian trustees should therefore convert all the Canadian estate into money and transfer it to the English trustees.

A MOTION under Rule 600 for the determination of certain questions arising under the will of Winifred Knight Dunlop Gemmill, deceased.

27th January 1945. The motion was heard by GREENE J. in Weekly Court at Ottawa.

H. P. Hill, for the Canadian executors and trustees, applicants.

T. A. Beament, K.C., for the Corporation of the Town of Almonte.

Lee A. Kelley, K.C., for Council of Justice to Animals and Humane Slaughter Association.

Alastair Macdonald and *R. W. D. Affleck*, for all the next-of-kin of the testatrix.

A. Racine, K.C., Public Trustee, for unascertained charities.

3rd August 1945. GREENE J.:—The general scheme of the testatrix is of importance in arriving at her intentions and the answers to the several questions which arise. Consequently it is convenient at the outset to present a digest of the will, only those portions being set forth verbatim where it is necessary to consider the exact words used.

Para. 1: Appointment of Dorothy Lilian Sideley and Thomas Glyn Powell (referred to as "my English Trustees") to be executors and trustees for the purpose of dealing with the whole estate of the testatrix except her estate in Canada "and for the purpose of receiving from my Canadian Trustees hereinafter appointed and dealing with the income and proceeds of sale of all real and personal estate devised and bequeathed to my Canadian Trustees which my Canadian Trustees might have to hand over to them pursuant to the directions in that behalf hereinafter contained."

Para. 2: Appointment of Louie Playfair Phillipps and Alexander Hill (referred to as "my Canadian Trustees") to be executors and trustees "in regard to and for the purpose of dealing with all real and personal estate" devised to the Canadian trustees.

Para. 3: Bequests as follows:—

(a) Twenty-five pounds to each of "my English Trustees" if they prove the will and act.

(b) One hundred pounds to the Council of Justice to Animals and Humane Slaughter Association.

(c) and (d) One hundred pounds to each of two other persons.

Para. 4: Bequests of all articles of personal use.

Para. 5: Devise of all real estate and residue of personal estate (other than real and personal estate devised to the Canadian trustees) to the English trustees upon trust to convert into money and after payment of debts, testamentary expenses and duties to pay the balance to Canadian trustees "Upon the Trusts hereinafter declared."

Para. 6: "I DEVISE AND BEQUEATH all my real and personal estate situate and being within the jurisdiction of the Canadian Courts and all debts and choses in action recoverable or enforceable in such Courts and also the residue of my English estate as aforesaid to my CANADIAN TRUSTEES UPON TRUST for the ALMONTE, ONTARIO TOWN COUNCIL to be applied by the said Town Council in the following manner:

“(a) AS TO my Freehold property in Almonte consisting of a house and lands commonly known as The Homestead Property consisting of ninety-eight acres or thereabouts being part of Lot 15 in the Ninth Concession of the Township of Ramsay Ontario now within the limits of the Town of Almonte to construct establish and maintain a Public Park or Recreation Ground.

“(b) AS TO two hundred acres in the Township of Huntley (near Almonte) described as West half of lot Nine in the Ninth Concession and East Half of Lot Nine in the Tenth Concession AND AS TO the One hundred and sixty acres (half section) situated in the Township of Sharpe District of Temiskenning No. Ontario being South half of Lot Nine in the Third Concession of the Township of Sharpe AND AS TO the East Part of Lot Twenty-one Concession Eleven in the Township of Ramsay County of Lanark Ontario AND AS TO my interest in the land consisting of approximately One hundred and sixty acres near Winnipeg in the Province of Manitoba and which was sold for me about three years ago by the Toronto General Trusts Corporation of Winnipeg but which has not yet been fully paid for by the purchaser For the purpose of establishing on these properties a Slaughter House or Slaughter Houses in which there shall be carried out the humane slaughtering of animals and with the object of carrying on and promoting and furthering in Canada the work of the Council of Justice to Animals and Humane Slaughter Association of London England AND AS TO my personal estate as aforesaid to be used for the purpose of promoting and furthering in Canada the work of the said Association.”

Para. 7: “I DECLARE that should the Trusts in favour of the Almonte Town Council fail for any reason whatsoever whether on legal grounds or otherwise my said Canadian Estate and the residue of my English Estate shall be transferred by my Canadian Trustees to my English Trustees UPON TRUST for the COUNCIL OF JUSTICE TO ANIMALS AND HUMANE SLAUGHTERING ASSOCIATION of London England absolutely for the purposes of the Association AND I DESIRE that in that event the said Association shall do its utmost to further its cause in the Dominion of Canada.”

The first question submitted is as to the meaning of the words “the Almonte, Ontario Town Council”. The words in slightly different arrangement quite evidently mean “the Town Council

[of] Almonte, Ontario". The trusts which the testatrix attempts to impose on the Town would require years for fulfilment so that the testatrix must have intended the town council from time to time. The only reasonable interpretation that can be put upon the words is that the devise is to the Corporation of the Town of Almonte in the Province of Ontario. No one on the argument suggested anything else. In *Williams v. Roy et al.* (1885), 9 O.R. 534, Boyd C. held that the words, "I give and bequeath to the Benevolent Institutions and Charities of the town of Owen Sound \$1,000, to be distributed as my executors shall deem meet," intended a bequest to the municipal corporation of Owen Sound to be distributed as the executors should direct.

The properties bequeathed to the Canadian trustees upon trust for the Town of Almonte and the trusts attached thereto are set out in sub-paras. (a) and (b) of para. 6 of the will.

Taken by itself, and disregarding for the moment the other provisions of the will, para. 6(a) presents no difficulty. It is a gift of land within the town to the Town to establish and maintain a public park. The Mortmain and Charitable Uses Act, R.S.O. 1937, c. 147, s. 8(2) (a), provides that land may be assured for a public park without being liable to forfeiture, and The Municipal Act, R.S.O. 1937, c. 266, s. 404(46), gives power to the Town to acquire and lay out public parks.

On the other hand, para. 6(b) presents many difficulties, both in its wording and as to the validity of certain of its provisions. The purpose of the devise in this clause is to promote and further in Canada the same objects as those of the Council of Justice to Animals and Humane Slaughter Association (for convenience, referred to hereafter as "the Association"). It is quite true that the testatrix uses the words "promoting and furthering . . . the work" of such Association, but in my opinion the will as a whole makes it clear that the Town of Almonte should pursue similar objects rather than act as an agent merely of the English Association. The constitution of the English Association provides that "The objects of the society shall be (1) the promotion of humane methods of slaughter; (2) the introduction of reforms in cattle markets where needed (including transport facilities); (3) the substitution of public abattoirs for private slaughter-houses."

Objects such as the above have been held to be charitable in a legal sense in many cases. A leading case, and closely in point, is *In re Wedgwood; Allen v. Wedgwood*, [1915] 1 Ch. 113, where, dealing with the trust before the Court in that case, Kennedy L.J. says:—

“It is a trust for the protection and benefit of animals. We know from the evidence that two objects which, in the opinion of the testatrix, would come within the purview of her generosity were the more humane slaughtering of animals and the establishment of municipal abattoirs.”

The trust was held to be a valid charitable trust, and the following words of Chitty J. where he states the underlying principle in *In re Foveaux; Cross v. Anti-Vivisection Society*, [1895] 2 Ch. 501, were quoted with approval:

“Cruelty is degrading to man; and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men. The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community.”

It now falls to examine clause 6(b). The testatrix devises three properties in Ontario and an interest in a property in the Province of Manitoba “for the purpose of establishing on these properties a Slaughter House or Slaughter Houses in which there shall be carried out the humane slaughtering of animals and with the object of carrying on and promoting and furthering in Canada the work of the Council of Justice to Animals and Humane Slaughter Association of London England.” No power of sale is given to the Canadian trustees except possibly an implied power for the purpose of transferring to England the proceeds of sale of the Canadian assets by reason of the failure of the trusts in favour of Almonte, which will be discussed later on. All these lands are apparently earmarked as sites for slaughter houses, and there is no power given to the Canadian trustees or to the Town of Almonte to sell some and use the proceeds for the erection of a slaughter house or houses on one or more of the other properties. That lends weight to the argument advanced that one or more slaughter houses must be erected on each

property to comply with the trust. Such seems to be the natural meaning of the words or, at the very least, it is one meaning that can reasonably be given the words without straining the construction in any way. Then follow the words, "with the object of carrying on and promoting and furthering in Canada. . . ." They seem to fortify the argument that the testatrix meant more than the establishment of a slaughter house at one place only.

The Town of Almonte has no power other than that given to it by statute. The Public Health Act, R.S.O. 1937, c. 299, s. 113, enables a municipality to establish a slaughter house within the municipality or in an adjoining municipality. Only one of the properties comes within the ambit of the Act, namely, that in the township of Ramsay, as it is an adjoining township. Consequently if the testatrix meant one or more slaughter houses to be erected on each property, then Almonte has no power to accept the trust. In my opinion that is what the testatrix did mean, but it is not necessary to decide the validity of the trust on that point alone. The testatrix later in the same clause, when dealing with personal estate, says it is "to be used for the purpose of promoting and furthering in Canada the work of the said Association." The work of the Association is not the "establishment of a public slaughter-house or abattoir with proper cattle-yards", which is all that the Town of Almonte has power to do, but its work is rather of an educational nature, as its objects set out above will demonstrate. The Town of Almonte has no power to accept a trust for such purposes. Twice in para. 6(b) the testatrix speaks of furthering the work of the Association "in Canada". It was argued that this meant "throughout" Canada. Too much importance should not be attached to the words "in Canada", but their use does lend support to the argument that the testatrix meant much more than the establishment of one slaughter house by Almonte with humane methods of killing. Also, in the last part of para. 7 the testatrix expresses a desire that the Association further its cause "in the Dominion of Canada". Section 267(1) of The Municipal Act, provides:—

"Except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law."

In my opinion the provisions of clause 6(b) must be held to be invalid.

The Town of Almonte took the position that the trusts in paras. 6(a) and 6(b) were all valid but, in the alternative, said that if the trusts in (b) were held to be invalid, then the trusts as between (a) and (b) were severable. If the trusts are severable there is no reason to doubt the validity of (a).

The question of severability arises by reason of the direction contained in the paragraph numbered seven in the will, whereby the testatrix directed her Canadian estate to be returned to England if the trusts in favour of Almonte should fail. It is a well-settled principle that authorities are not particularly helpful in the construction of a will, if the will contains a clear enunciation of the testator's intention. A number of authorities to that effect are referred to in a recent case in our own courts, *Re Wolff*, [1943] O.W.N. 470. In my opinion careful consideration of the will before us does reveal the clear intention of the testatrix. It is apparent that her great desire—almost to the exclusion of everything else—was to further the same objects as those of the Association. The bequests from her English estate, prior to the residue, consist of—

(a) Twenty-five pounds to each of her English trustees.

(b) One hundred pounds to the Council of Justice and Humane Slaughter Association.

(c) One hundred pounds to each of two persons.

(d) Her personal effects.

The £250 and the personal effects are very minor dispositions in comparison with the residue, which was stated to be a substantial amount. Her whole Canadian estate is devoted to the same purpose, with the exception of the property bequeathed in para. 6(a) for a public park. It was argued that the devise in 6(a) might have been made to induce the Town of Almonte to accept the trusts in 6(b), and it may be that such was the intention of the testatrix. It was submitted, in support of the argument that the trusts are severable, that they are set forth in separate paragraphs. That is only partially true; the whole Canadian estate is devised to the trustees in the first part of para. 6, the public park trust being dealt with later in sub-para. (a), and the humane slaughter trust in sub-para. (b). If the two were completely

separate in the mind of the testatrix, the natural thing to expect would be a devise direct to the Town of Almonte of the lands in (a) for a public park. It is a simple and far from uncommon kind of bequest. There seems to be no reason why this devise should be made to the trustees at all unless it was connected with the gift made in sub-para. (b). If the testatrix intended the property in (a) to follow the same course as that in (b), in the event of the trusts failing, that was good reason for putting the (a) property into the hands of her trustees, as she did. The testatrix quite evidently realized that there might be some difficulty with the trusts in favour of Almonte, and it does not seem unreasonable to suspect that her apprehension of a possible failure arose in connection with the uncommon trust of (b), rather than the not uncommon trust of (a). Yet, in para. 7, she says should the "trusts" fail, her Canadian estate is to be transferred to England. She does not say "one of the trusts", nor does she except the park property from her Canadian estate, in case clause 7 should come into operation. The "trusts" do fail in the sense that they are not all valid, and that particular one fails which was to further the purpose shown, by the general structure of the will, to be paramount in her mind. The use of the words "trusts" and "my said Canadian estate", in my opinion, indicate that it was all one scheme in the mind of the testatrix and that it was not intended that the trusts in paras. 6(a) and 6(b) should be severable. There is no doubt about the meaning of "my said Canadian estate"; it means the whole Canadian estate. The word "trusts" causes some difficulty as not all the trusts fail if the gifts are intended to be distinct and separate gifts, but if the whole was intended as one scheme then the word "trusts" applies accurately to what has taken place. In my opinion, the will as a whole demonstrates that the main purpose of the testatrix was to further the same objects as those of the Association, preferably in Canada through the agency of the Town of Almonte, but if the scheme in favour of Almonte failed, then her whole estate in the hands of her Canadian trustees was to be transferred to her English trustees for the benefit of the Association. The "trusts" or scheme in favour of Almonte has failed, and the whole Canadian estate plus the residue of the English estate should be transferred to the English trustees.

In my opinion the Canadian trustees should convert the real and personal estate in their hands into money and transfer it to the English trustees. Among other purposes the English trustees were appointed "for the purpose of . . . dealing with the income and proceeds of sale of all real and personal estate devised and bequeathed to my Canadian Trustees which my Canadian Trustees might have to hand over to them pursuant to the directions in that behalf hereinafter contained." By these words the testatrix clearly indicates that she contemplates the Canadian trustees turning all her Canadian estate into money and connects such words with para. 7 by the words "pursuant to the directions in that behalf hereinafter contained." Para. 7 having become operative by the failure of the trusts, there is a power of sale given to the Canadian trustees which it is their duty to exercise for the purpose of transferring the "proceeds of sale" to the English trustees.

The question was also discussed as to whether the words "and I desire that in that event the said Association shall do its utmost to further its cause in the Dominion of Canada" created a binding trust or were merely the expression of a wish. That question, it seems to me, is one that should be settled by the English courts. If my view is right that the whole estate should be returned to the English trustees, then they and the Association seem to be the only parties interested. The English trustees were not represented before me but, as counsel for the Association presented argument that the words did not create a binding trust and counsel for the next-of-kin submitted the contrary view, it may not be improper for me to express an opinion subject to what I have said as to the English courts, particularly in the light of the view that seems to me to be the correct one.

In *In Re Atkinson; Atkinson v. Atkinson* (1911), 80 L.J. Ch. 370 at 373, it was said:

" . . . the Court ought to be very careful not to make words mandatory which are a mere indication of a wish or a request. The whole will must be looked at . . ." It must be borne in mind that the words under consideration only come into effect after the effort made by the testatrix to further the cause of the Association in Canada had failed. It seems to me that in the light of such failure, if the testatrix wished to create a binding

trust, she would have used words that would have been imperative beyond doubt. The words of Wright J. in *Re Hiscox* (1926), 30 O.W.N. 109, apply very directly:—

“The rule now followed is that unless the words denote that the request of the testator is in the nature of an imperative direction no trust is to be implied. . . .

“The testator first devises and bequeaths all his property to his wife, so that the principle of construction that where an absolute gift is made it is not to be cut down by any subsequent words, unless they are clear and explicit, applies.”

See also *Re Clark* (1919), 17 O.W.N. 88.

In this case the devise is “absolutely” to the Association, and in my opinion the words “desire” and “do its utmost” are not imperative but merely the expression of a wish on the part of the testatrix. They do not cut down the absolute gift.

Costs of all parties out of the estate, those of the Canadian executors and trustees as between solicitor and client.

Order accordingly.

Solicitors for the Canadian trustees, applicants: Hill & Hill, Ottawa.

Solicitors for the Town of Almonte: Beament & Beament, Ottawa.

Solicitors for the Association: Ewart, Scott, Kelly, Scott & Howard, Ottawa.

Solicitors for the next-of-kin: Clark, Robertson, MacDonald & Connolly, Ottawa.

[GREENE J.]

Niles et al. v. Lake.

Trusts — Resulting Trust — Applicability of Principles to Joint Bank Account — Effect of Joint Deposit Agreement with Bank — No Real Agreement between Parties.

Banks and Banking — Joint Account — Absence of Consideration — Presumption of Resulting Trust — Effect of Joint Deposit Agreement — No Meeting of Minds.

Where a joint bank account is opened with funds which are entirely the property of one of the holders of the account, there is a presumption of a resulting trust in favour of the depositor, and, although the legal estate in the money passes to the other account-holder, it will be presumed that he holds it as trustee for the depositor, unless there is evidence of an intention to the contrary. The usual bank form of "joint deposit agreement", even if it states that the parties have agreed that the money shall be their joint property, will not be sufficient to rebut the presumption, as between the parties or their representatives, if it appears that there was in fact no meeting of minds or agreement on the subject. *Southby v. Southby* (1917), 40 O.L.R. 429, applied; *Plater v. Brealey*, [1938] O.W.N. 365, affirmed [1939] O.W.N. 203, distinguished; *In re Mailman Estate*, [1941] S.C.R. 368, discussed.

TRIAL of an issue directed by order of Hope J.

16th March 1945. The issue was tried by GREENE J. without a jury at Toronto.

F. A. Brewin and (Miss) F. A. Levis, for the plaintiffs.

J. R. Cartwright, K.C., and *R. J. R. Russell*, for the defendant.

29th August 1945. GREENE J.:—The parties are the surviving brother and sisters of Georgena Arnott.

On the 16th December 1943, Georgena Arnott was in the hospital at Port Hope, and at her request the manager of the Royal Bank of Canada at Port Hope called on her. She advised him that she wished to open a joint account with her sister Blanche V. Lake. The bank manager said it would be necessary that the standard form of the bank be signed. Mrs. Arnott signed the form and handed him \$560 in cash for deposit in the account. The same day he sent the bank form to Mrs. Lake for signature, and it was returned in due course. In January and February 1944 Georgena Arnott withdrew something over \$200 from the account. In the latter half of February 1944, she had deposits of over \$9,000 made in the joint account and she died on 27th February 1944. The defendant Blanche V. Lake did not operate the account at any time either by way of deposit or withdrawal until September 1944, when she first became aware that she might have a personal claim to the money. She then

transferred the whole balance to her name. The plaintiffs ask for a declaration that such sum of \$10,070.80 was an asset of the estate of Georgena Arnott. The defendant relies entirely on the agreement under which the joint account was opened. That agreement was as follows:

“AGREEMENT RE JOINT ACCOUNT

“To

THE ROYAL BANK OF CANADA,

Port Hope, Ontario Branch:

“We, the undersigned, having opened a Savings Deposit Account with the above named Branch of THE ROYAL BANK OF CANADA in our joint names do for valuable consideration (receipt whereof is hereby acknowledged) hereby mutually agree, jointly and each with the other or others of us and also with the said THE ROYAL BANK OF CANADA, that all moneys now or which may be hereafter deposited to the credit of the said account, and all interest thereon, shall be and continue the joint property of the undersigned with right of survivorship; and each of the undersigned in order effectually to constitute the said joint deposit account hereby assigns and transfers to all of the undersigned jointly and to the survivor or survivors of them any and all moneys which may have been heretofore or may now or hereafter be deposited to the credit of the said account together with all interest which may accrue thereon to be the joint property of the undersigned and the property of the survivor or survivors of them.

“Each of the undersigned hereby irrevocably authorizes the said Bank to accept from time to time as a sufficient discharge for any sum or sums withdrawn from the said deposit account any receipt, cheque or other similar document signed by any one or more of the undersigned without any further signature or consent of the other or others of the undersigned thereto.

“It is understood and agreed by the undersigned with each other and with the said Bank that the death of one or more of the undersigned shall not affect the right of the survivors or any one of them or of the sole survivor to withdraw all of the said moneys and interest from the said Bank and to give a valid and effectual discharge or receipt therefor. Provided, however, that this understanding and Agreement is subject to the requirements

of any Succession Duty Act in respect of such moneys and the interest thereon.

"This agreement shall be binding upon the heirs, executors, administrators, and assigns of each of the undersigned parties hereto.

"WITNESS our hands and seals this 16th day of December A.D. 1943.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

"Harold Gordon Jix"

"Georgena Arnott" (Seal)

"Arthur J. D. Lake"

"Blanche V. Lake" (Seal)

There was no discussion between Mrs. Arnott and the defendant Mrs. Lake, nor was there any agreement between them, except in the sense that they both signed the bank document. Shortly after Georgena Arnott's death some of the present parties met in the solicitor's office and on that occasion the defendant said either that the joint account was for convenience or that she supposed it was for convenience. It is not material, as in either case it merely confirmed the other evidence that there was no discussion or agreement between Mrs. Arnott and Mrs. Lake. They both merely acquiesced with the bank manager's demand that the bank's form be signed if a joint account was to be opened.

The plaintiffs' claim is that while the legal estate in the money passed to the defendant, there was a resulting trust in favour of Georgena Arnott. In *White & Tudor's Leading Cases in Equity*, 9th ed., 1928, vol. 2, p. 762, the note following the discussion of the leading case of *Dyer v. Dyer* is:—

"On a voluntary conveyance or transfer of the legal estate or interest in any property, whether real or personal, to a stranger (*i.e.*, to a person other than the wife or a child of the transferor), a resulting trust of the whole beneficial interest is *presumed* in favour of the grantor or transferor, in the absence of any expression of intention that the grantee or transferee is to take beneficially; and the rule seems to be the same as to both real and personal estate."

Evidence to rebut the presumption is entirely lacking, as appears from the brief statement of the material facts set out above. There is some evidence that Georgena Arnott did not intend to prefer the defendant over her other sisters and brother.

The joint bank account was opened on the 16th December and on the 29th December Mrs. Arnott made her will whereby the present parties are made residuary legatees in equal shares after some minor bequests of personal belongings.

The defendant must rely entirely on the deposit agreement, with particular reference to the words which purport to create a joint tenancy in the moneys.

Mr. Brewin points to several statements in the bank form in support of the other evidence that there was no meeting of minds between Mrs. Arnott and Mrs. Lake. The agreement commences with a statement, "We the undersigned, having opened, etc.", whereas the account was opened solely by Mrs. Arnott. The opening date in the account is 16th December, and that is the date of the letter from the bank manager to Mrs. Lake in Toronto, so that she probably knew nothing of the account until the 17th. The agreement purports to be for valuable consideration between the joint depositors, and there was no such consideration. According to the form the parties agree that all money shall be joint property, but Mrs. Lake did not know what was in the account until after the death of Mrs. Arnott.

In my opinion the document does not represent the true facts and cannot be considered as anything more than a voluntary assignment of the legal interest in the money to the defendant. In such case the presumption of a resulting trust arises and there is nothing in the evidence to rebut the presumption.

In *Southby v. Southby* (1917), 40 O.L.R. 429, 38 D.L.R. 700, moneys were placed to the credit of husband and wife and the form signed by them declared the moneys to be their joint property. In dealing with this, Meredith C.J.C.P. says as follows, at p. 432:

"But this writing is in no sense a contract between the parties to this action; it is merely a direction to the bank, in the form of a letter addressed to the bank's manager at its branch in which the account was opened; and is wholly in a printed general form, prepared and supplied by the bank, for its protection only; it is none the less evidence against the defendant, as an admission made by him, but as an admission only.

"The letter describes the moneys to be deposited as 'our joint property,' but adds, 'such moneys may be withdrawn by either one of us, or the survivor of us.' It is of course open to either party to shew that the statement that the moneys 'are our joint prop-

erty' was, as between these parties, though not as to the bank, inaccurate: and, if the words meant 'our joint property before the deposit,' that was, as I have said, not so, they were the defendant's, the proceeds of the sale of his land; and, if it meant after deposit, it was also inaccurate, for in reality they were his moneys to be drawn by his wife for the payment of his obligations. . . ."

The cases are reviewed and discussed in *In re Mailman Estate*, [1941] S.C.R. p. 368, [1941] 3 D.L.R. 449. In that case the presumption that there was no gift was supported by the majority of the Court with Davis and Hudson JJ. dissenting.

The dissenting judgments were based on the form of the deposit agreement, but there was evidence in that case that the husband and wife had attended at the bank together in connection with the opening of the joint deposit account. There is also a statement in the judgment of the Chief Justice of the Supreme Court of Nova Scotia, 15 M.P.R. 169, [1940] 2 D.L.R. 721 (from which the appeal was taken), stating "that the document expressed an oral agreement which we must assume preceded the signing." In the case at bar the evidence establishes beyond question that there was no agreement between the parties prior to the execution of the agreement.

Mr. Cartwright relied very strongly on *Plater v. Brealey*, [1938] O.W.N. 365, affirmed [1939] O.W.N. 203. In that case there was strong evidence of intention on the part of the donor to benefit the donee. Both parties attended the bank together and executed the joint account agreement at that time. Mr. Cartwright relied on that part of the judgment which dealt with the effect of the statement that the moneys were to be joint property. It does not seem to me that the reasoning in *Plater v. Bealey* is applicable to a document executed in the circumstances of this case.

There will be a declaration as asked by the plaintiffs, that the moneys of the joint bank account are part of the estate of Georgena Arnott.

The costs of all parties will be payable out of the estate.

Judgment accordingly.

Solicitors for the plaintiffs: Mason, Cameron & Brewin, Toronto.

Solicitors for the defendant: Wray & Russell, Toronto.

[HOGG J.]

Schraeder v. The Township of Grattan.

Highways—Municipal Liability for Repair—How Highway Constituted—Dedication by Owner and Acceptance by or on behalf of Public—Deprivation of Access—Notice of Action—The Municipal Act, R.S.O. 1927, c. 233, ss. 442, 469, 483, 490.

It is still possible in Ontario for a road to be constituted by dedication and acceptance by or on behalf of the public, without any necessity for a municipal by-law to signify the acceptance. When a road is so constituted, s. 490 of The Municipal Act, 1927, is not applicable, and it is not necessary to obtain the consent of the Municipal Board, even if the road is less than the prescribed width. The question whether a highway has been established by dedication is one of fact, and two essential elements are required: (1) an intention on the part of the owner of the land to dedicate it, and (2) an acceptance by or on behalf of the public.

Where it is established that there have been negotiations between a landowner and a municipality for the exchange of lands for a road, followed by mutual conveyances and a request to the municipality for the expenditure of public funds in the construction of a road, and that the municipality has expended some money and required some statute labour to be done, the facts are sufficient to show that a road has been constituted by dedication and acceptance.

As soon as a road has been constituted by dedication and acceptance, the liability of the municipality to keep it in repair, under s. 469(1) of The Municipal Act, 1927, arises. It is not necessary that a road should actually have been built, and repair includes construction in the first place, as well as maintenance. If, through the municipality's failure to perform this duty, a landowner suffers damage, as by the access to his land becoming less convenient, he will be entitled to damages, but they will be limited to those suffered during a period of three months less one day before the bringing of the action. Liability resulting from failure to repair, under s. 469, is not limited to cases of accident, but includes any cause of action resulting from the municipality's default. *Strang v. Township of Arran* (1913), 28 O.L.R. 106 at 112, followed; *Dick v. The Township of Vaughan* (1917), 39 O.L.R. 187, not followed; *Weston v. County of Middlesex* (1913), 30 O.L.R. 21, referred to.

Quite apart from s. 469 of the Act, a municipality will be liable at common law for a nuisance, occasioning special damage, on a highway, and such an action is not subject to the statutory conditions as to time, notice, etc. But merely causing certain work to be done upon a strip of land constituted a highway by dedication and acceptance, and then discontinuing the work, leaving the roadway in an impassable condition, does not seem to come within this class, or to give rise to any right of action except under the statute.

AN APPEAL by the defendant from the report of a County Court Judge upon a reference. The facts are fully stated in the reasons for judgment.

30th May 1945. The appeal was heard by HOGG J. in Weekly Court at Toronto.

R. M. W. Chitty, K.C., for the defendant, appellant.

C. L. Yoerger, for the plaintiff, respondent.

17th July 1945. HOGG J.:—On the 22nd October 1942, Plaxton J. upon consent of the parties, ordered that this action be referred to the County Court Judge of the County of Renfrew for trial, and on the 11th June 1943, His Honour Judge Mulcahy made his report, in which he found in favour of the claims put forward by the plaintiff. The defendant municipality now appeals against the report.

The plaintiff owns a farm consisting of lots 25 and 26 in the 17th concession of the township of Grattan, in the county of Renfrew, and claims that a certain strip of land was dedicated to the defendant municipality and accepted by it for the purpose of a road running from his farm to a nearby highway. The plaintiff says that the defendant has not completed the construction of a passable road over this strip of land, and that he, therefore, has no proper or convenient access to his farm and has thereby suffered damage.

The trial judge found that the dedication of the strip of land in question for the purposes of a road had been established, and held that the defendant should be ordered to construct a reasonably passable road over the said strip. He also found that by reason of the failure on the part of the defendant municipality to construct such a road, the plaintiff had suffered damage to the extent of \$400.

The evidence is, I think, clear, and it was so found by the trial judge, that in the year 1935 one Feely exchanged a strip of land 40 feet in width, already cleared and fenced, from the easterly side of lot 25 in the 18th concession of the said township, which he gave and conveyed to the defendant municipality, in return for an unopened road allowance between lots 25 and 26 in the same concession, which was conveyed by the defendant to Feely. Some months after this exchange of land the defendant municipality made a grant of \$50 to the plaintiff towards the payment for work done by the plaintiff in the construction of a road on the strip in question. There is evidence that the defendant municipality also paid the men whom the plaintiff had engaged to work on the road, and that the defendant had put in certain culverts. There is evidence that a contractor had been instructed by the defendant municipality to start the construction of a passable road, but no contract binding on the defendant was entered into for this purpose.

The trial judge found, and there is evidence to support such finding, that the plaintiff was directed by the servants of the defendant municipality to do certain statute work on the strip of land.

The principal defence of the municipality is that its powers are wholly statutory and that as no by-law has been passed establishing a road, and as the provisions of s. 490 of The Municipal Act, R.S.O. 1927, c. 233, in force in 1935, had not been complied with, the defendant was and is under no obligation to construct or to repair or to maintain a road on the said 40-foot strip of land, nor has the plaintiff the right to maintain the present action, because of his failure to give the notice required by s. 469.

There is no evidence that a by-law was passed by the defendant corporation, sanctioning the laying out of the roadway in question, nor is there evidence that because the proposed road is less than 66 feet in width, the approval of the Municipal Board was obtained according to the requirements of said s. 490. The plaintiff argues that the common law method of establishing a road or highway by dedication and acceptance not only has not been abrogated by The Municipal Act, but is authorized by the statute, and that a by-law is required only where a highway is laid out or established by a municipality when it desires to open up a roadway as provided by certain sections of The Municipal Act.

Section 442 of that statute sets out the manner in which public highways are constituted, and states, *inter alia*, that all highways laid out or established under the authority of any statute, or roads on which public money has been expended for opening them, or on which statute labour has been usually performed, and all roads dedicated by the owner of the land to public use, shall be common and public highways.

It is said by Biggar in his Municipal Manual, 1900, at p. 806, that in Ontario, since the enactment in the year 1810 of the statute 50 Geo. III, c. 1, one of the classes of highways in this Province consists of roads dedicated by private owners and accepted as highways by or on behalf of the public.

In *Lockie v. Township of North Monaghan* (1917), 12 O.W.N. 171, in the Court of Appeal, Meredith C.J.C.P. said:

"The defendants denied responsibility in respect of this highway, on the ground that it had never been established by by-law of the council or otherwise assumed for public use by the corporation: Municipal Act, R.S.O. 1914, ch. 192, sec. 460(6). But the road was dedicated to the public by those who opened it; a deed to the township corporation was executed, and was registered by an officer of the corporation; some money was paid by the corporation for repairs done upon the road; and there was no evidence of any repudiation of these acts. Upon the acceptance by the defendants of the dedication of the land as a highway, the land vested in them, under the provisions of sec. 433 of the Act." This section is s. 443 in the statute of 1927.

In *City of Ottawa v. Grand Trunk R.W. Co.*; *City of Ottawa v. Ottawa and New York R.W. Co.* (1921), 50 O.L.R. 239, 64 D.L.R. 337, in the Appellate Division, where the question of the dedication of land for a public highway was under consideration, Meredith C.J.O. said, at p. 248:

"It was contended by counsel for the appellants that what was done was ineffective because of the absence of a by-law of the council of the respondent corporation authorising the diversion and of authority from the Railway Committee of the Privy Council to make it.

"In my opinion, the appellants are estopped by their acts and conduct from raising this objection. They have taken possession and are and have been since the diversion was made, occupying and using as their own what, in my view, was undoubtedly part of Nicholas street Although no by-law was passed authorizing the diversion, the respondent is bound by acquiescence, and could not now successfully set up the want of a by-law; *The Township of Pembroke v. The Canada Central Railway Company* (1882), 3 O.R. 503."

In *Township of Bertie v. Snyder et al.*, [1933] O.W.N. 43, affirmed [1933] O.W.N. 501, in considering the question whether a road was a public highway Logie J. said that "Although there has been no municipal by-law accepting it as a road, in addition to dedication, user by the public and statute labour performed upon such parts as required the same, public money has been for a long period of time expended upon Road 32." It was held that the road in question was a public highway.

In *Batt v. Village of Beaverton*, 52 O.L.R. 159, [1923] 3 D.L.R. 424, in the Appellate Division, Middleton J., at p. 162, stated the matter in the following language:

"Was the road dedicated by the owner to public use, i.e., to public use as a highway?

"Under the statute as it now stands it would seem to be necessary that there should be the sanction of the municipality, probably expressed by a by-law for the establishment of the road. At the time when, it is said, this road was dedicated, I am ready to assume that there could be dedication by an owner, as in England, by the opening up of a road with the intention on the part of the owner to dedicate it as a highway and an acceptance by public user as distinct from municipal action."

Middleton J. was referring to s. 479 of The Municipal Act of 1914, as enacted by 1914, c. 33, s. 20, which sets out, as does s. 490 of the 1927 statute, that no highway can be laid out without the sanction of the council of the municipality. In the same appeal Masten J., speaking of the question of dedication, said:

"In the second place, as to any acceptance by the municipal corporation, it is admitted that there is no by-law of acceptance, and that there is no plan filed by any owner shewing the lands in question to be laid out as a highway, . . . The use necessary to evidence an acceptance of a dedication must be a use by the public of the land *as a road*."

The dictum of Middleton J., that it is probable that a by-law would be required to express the sanction of the municipality in the establishment of a road, does not appear to coincide with the opinion of Masten J., which contemplates that the sanction of the municipality can be given by proper acceptance. In all these cases where a road has been dedicated to public use, the sole judgment which suggests that a by-law might be required, to signify the sanction of a municipality, is that of Middleton J. in *Batt v. Beaverton*.

Section 490 of the 1927 Act reads in part:

"(1) No highway shall be laid out in any municipality without the sanction of the council of the municipality."

Subs. 2 provides, *inter alia*:

"(2) No highway less than 66 feet in width . . . shall be laid out . . . without the approval of the Municipal Board".

In *Palmatier v. McKibbon* (1894), 21 O.A.R. 441 at 451, it is said that "laying out" a road means laying it out on the ground by survey in the usual manner and declaring that as so laid out it is a public highway.

By s. 483(1) of the statute, the council of every municipality may pass by-laws "(a) For establishing and laying out highways".

A highway under s. 442, "laid out or established under the authority of any statute," would be a highway such as is contemplated by s. 483, and would be a highway of the character to which s. 490 would apply, because that latter section appears to contemplate only a highway to be "laid out". But s. 442 provides also for roads that are not laid out, but are constituted roads because public money has been expended for opening them or because they have been dedicated by the owner of the land to public use. Such roads, not being of the class of roads which are laid out by statute, would not appear to come within, or to be affected by, the terms of s. 490, requiring sanction and approval by the Municipal Board.

Furthermore, s. 443 speaks of the vesting of a dedicated highway, as apart from one established by by-law.

Section 469(6) of the Act speaks of a highway established by by-law "or otherwise assumed for public use by the corporation."

I think it is to be concluded that a public road or highway dedicated to public use does not come within the purview of s. 490, for the reason that such road or highway is not one which is laid out as contemplated by ss. 442 and 483, and it is only a highway so laid out that requires sanction by by-law and is subject to the further terms of the said s. 490.

There now remains for consideration the question whether the facts show that the 40-foot strip of land was established as a highway by dedication. This is a question of fact: *The City of Hamilton v. Morrison* (1868), 18 U.C.C.P. 228. Two essential elements are required: (1) intention on the part of the owner of the land to dedicate, and (2) an acceptance by the public of such road as a highway.

In *Bailey et al. v. The City of Victoria et al.*, 60 S.C.R. 38, 54 D.L.R. 50, [1920] 1 W.W.R. 917, Anglin J. said, at p. 59:

"But, in order to bring a highway into existence by dedication in addition to the intention of the owner of the soil to dedicate it to the public for that purpose, however directly evidenced, an acceptance by the public is also essential." See also *Maccomb et al. v. Town of Welland* (1907), 13 O.L.R. 335.

The negotiations between Feely and the plaintiff and the defendant corporation for the exchange of lands for a road, followed by a deed of conveyance of the 40-foot strip, fenced in and cleared, by the owner Feely to the defendant corporation, and a request to the defendant to have work done and money expended in the construction of a road upon this strip of land, show the intention on the part of the owner to dedicate the land for the purposes of a highway, and show, I think, that he did everything possible on his part to carry out such intention.

With respect to the matter of acceptance by the public, Middleton J. said in *Re Sanderson and Township of Sophiasburgh* (1916), 38 O.L.R. 249 at 252, 33 D.L.R. 452:

"In Ontario, as the highway is vested in the municipality, it is necessary to find an assent on the part of the municipality to the dedication. This assent may be presumed from the expenditure of public money upon the road, but it may be shewn in other ways."

The requirements necessary to show acceptance are also mentioned in *St. Vincent v. Greenfield* (1887), 15 O.A.R. 567, where Osler J.A. said:

"If the road has been laid out and dedicated by the land-owner, the performance of statute labour upon it, or the expenditure of public money in opening it, is evidence of its acceptance and establishment as a highway by the municipality." This judgment is discussed by Rose J. in *Point Abino Association v. Township of Bertie*, 61 O.L.R. 120, [1927] 4 D.L.R. 503, affirmed 61 O.L.R. 610, [1928] 2 D.L.R. 31. That the expenditure of public money is evidence of acceptance by a municipal corporation is laid down in *Lockie v. Township of North Monaghan, supra*, and *Reaume v. City of Windsor* (1915), 8 O.W.N. 505.

With respect to proof of acceptance by the defendant municipality and an assent on its part to the dedication on behalf of the public, there is the fact that the defendant exchanged a road allowance west of lots 25 and 26 for the 40-foot strip on

the east side of the said lots, and there is evidence that the purpose of such exchange was that a road might be constructed over this 40-foot strip. There is evidence of the expenditure of public money on the said strip of land and evidence that the defendant directed that statute labour, to some extent at least, be done upon this strip. There is evidence that the defendant municipality took steps to negotiate a contract for the construction of a road over the strip. Such acts would seem to be sufficient, under the authorities, to establish acceptance.

By s. 469(1) of The Municipal Act, 1927, a highway is to be kept in repair. But a right of action at common law against a municipal corporation, for a nuisance on a highway which has occasioned special damage, exists apart from the statutory liability for non-repair imposed by The Municipal Act. The provisions and conditions pertaining to an action brought by virtue of the statute, as to the time for bringing the action and as to notice, would not apply to an action based on the common law right. Riddell J. (afterwards J.A.) said in *Brown v. City of Toronto* (1910), 21 O.L.R. 230, that there are two kinds of action which can be brought in Ontario against municipalities where injury has been sustained: (1) an action at common law based upon a nuisance in the highway, and (2) an action under the statute for omitting to keep a highway in repair. This section of The Municipal Act was the subject of consideration in the more recent case, in the Supreme Court of Canada, of *Prentice et al. v. The City of Sault Ste. Marie*, [1928] S.C.R. 309, [1928] 3 D.L.R. 564. Anglin C.J.C. said, at p. 316:

“ . . . the subject matter of that subsection, i.e., actions based on default in discharging the duty of keeping in repair thereby imposed, which entails a liability entirely distinct from, and independent of, that resulting at common law from the creation of a nuisance on a highway.”

Where the powers given by a statute to do certain acts are permissive, they should be exercised in strict conformity with private rights, and do not confer a licence to commit a nuisance: *Guelph Worsted Spinning Co. v. City of Guelph*; *Guelph Carpet Mills Co. v. City of Guelph* (1914), 30 O.L.R. 466, 18 D.L.R. 73. An action for nuisance may be brought on the ground that the act complained of interferes with the comfort of the plaintiff in the enjoyment of property owned by him or that it causes

actual damage to the plaintiff's property. *O'Neill v. Harper* (1913), 28 O.L.R. 635, 13 D.L.R. 649, deals with the rights arising from an obstruction of a highway causing a nuisance.

It is with some hesitation, and with some regret, that I have come to the conclusion that what was done by the defendant municipality in causing certain work to be done upon the strip of land in question and then leaving it in an impassable condition does not seem to come entirely within the class of things that have been held to be nuisances with respect to highways.

The whole issue must then be considered from the standpoint of the right of the plaintiff under The Municipal Act. It was said in *Toms et ux. v. The Township of Whitby* (1874), 35 U.C.Q.B. 195, affirmed 37 U.C.Q.B. 100, that there was no action at common law against a municipality for injury for non-repair, and in the *Prentice* case, *supra*, in the Court of Appeal, 61 O.L.R. 246, [1927] 4 D.L.R. 800, (reversed by the Supreme Court of Canada on the ground that there was a nuisance and therefore a common law action), Riddell J.A. said that there was no right of action for simple non-repair against a municipal corporation except that given by the statute.

It was argued by counsel on behalf of the defendant that because no actual or subsisting road had ever existed over the 40-foot strip of land, it could not be considered to be a highway as contemplated in s. 469. It is true that it has been held that there is no obligation upon a municipality to keep in repair an old unopened road allowance which has never been a highway, as there is in such case no subsisting road, but only an allowance for a road: *Hislop v. The Township of McGillivray* (1888), 15 O.A.R. 687, affirmed 17 S.C.R. 479; *Taylor v. Gage* (1913), 30 O.L.R. 75, 16 D.L.R. 686. In *Bryant v. The City of Toronto et al.*, [1933] O.R. 105, [1933] 1 D.L.R. 535, in the Court of Appeal, it was held that the word "repair" in s. 469(1) of The Municipal Act applies only to an existing thing. Latchford C.J. made use of the somewhat trite expression, "What is non-existent cannot be repaired." This was a case where a bridge was in such condition that it could not, in a commercial sense, be repaired. The judgment in *Filshie v. Township of Egremont*, 53 O.L.R. 238, [1923] 4 D.L.R. 1180, was followed. In that case a bridge was wholly destroyed, and the Court held that no obligation rested on the municipality to restore it.

But a strip of land, dedicated by the owner and accepted by the municipality for the purposes of a road, has had something added to it which has changed its character from that of a mere unopened road allowance. Anglin J. in *Bailey v. City of Victoria*, *supra*, speaks of bringing a highway into existence by dedication.

As soon as a road has been established by by-law, or otherwise assumed for public use by the corporation, it becomes a highway which is liable to be kept in repair: *Holland v. Township of York* (1904), 7 O.L.R. 533; *Batt v. Beaverton*, *supra*. The principle laid down in the *Bryant* judgment does not, in my opinion, apply to the circumstances of the case at bar, because, following the decisions I have mentioned, a highway as contemplated by s. 469 does exist when land has been dedicated and accepted for the purposes of a highway.

To keep in repair involves original construction and putting in repair in the first instance and reconstruction when necessary: *Sandlos v. Township of Brant* (1921), 49 O.L.R. 142, 58 D.L.R. 673. The 40-foot strip of land involved in this action became an existing highway by dedication, but one which cannot be put to reasonable use until certain work has been done upon it. It would seem to me that, otherwise, the establishment of a highway by dedication for any practical purpose would be of little value.

Keeping in repair includes maintenance: *Ackersviller v. County of Perth* (1914), 32 O.L.R. 423, affirmed 33 O.L.R. 598, 22 D.L.R. 666. When it is shown that a road is not in a reasonable state of repair, and damage has been caused by want of repair, a *prima facie* case is established against the municipality: *Greer v. Township of Mulmur*, 59 O.L.R. 259, [1926] 4 D.L.R. 132.

In *Weston v. County of Middlesex* (1913), 30 O.L.R. 21, 16 D.L.R. 325, affirmed in the Court of Appeal, 33 O.L.R. 598, 19 D.L.R. 646, Meredith C.J.C.P. said, at p. 23:

"In the public interests, the highways must be maintained for the public benefit; and so legislation has for many years put that duty upon the municipal corporations of the Province." The word "repair" is to be given a broad and elastic meaning. It is to be sufficient from time to time for the reasonable needs of traffic. See also *The Town of Oakville v. Cranston* (1917),

55 S.C.R. 630, 39 D.L.R. 762; *Foley et al. v. Township of East Flamborough* (1898), 29 O.R. 139 (reversed on other grounds, 26 O.A.R. 43).

In *Cummings v. The Town of Dundas* (1907), 13 O.L.R. 384, in a Divisional Court, the judgment in *Castor v. The Township of Uxbridge* (1876), 39 U.C.Q.B. 113, was referred to. It was there said that the object of the statute was the safety and convenience of the public when lawfully using the highways. Also in *Lucas v. The Township of Moore* (1879), 3 O.A.R. 602, and in *Plant v. The Township of Normanby et al.* (1905), 10 O.L.R. 16, the duty of the municipality was held to be that the highways should be kept in such a condition of repair as the reasonable demands of traffic over them should from time to time require. Regard should be had to surrounding material circumstances. The road should be reasonably sufficient for the requirements of the particular locality.

In the *Cummings* case a highway was washed away by the overflow of water from a creek, rendering it difficult to use, and the plaintiff claimed special damage as this road was the only means of obtaining access to his property. It was held that the plaintiff was entitled to damages in the sum of \$25 for the period commencing three months before the issue of the writ.

The scope of the section obliging a municipality to keep a highway in repair is not limited to damages to the person, or to damages arising from some accident, but includes any cause of action resulting from the municipality's default: Mulock C.J. in *Strang v. Township of Arran* (1913), 28 O.L.R. 106 at 112, 12 D.L.R. 41.

In *Dick v. Township of Vaughan* (1917), 39 O.L.R. 187, 34 D.L.R. 577, Meredith C.J.C.P. was highly critical of the judgments in both the *Cummings* case and the *Strang* case, and was of the opinion that the duty of a municipality to repair a highway is owed to all alike and "so the damages must be such as are sustained whilst so using it: and that cannot be except when upon the highway." It was said that s. 460 (now s. 469) of the statute "really covers only what may be in a general way described as accident cases." This opinion does not seem to be on all fours with the judgment of the same learned judge in *Weston v. County of Middlesex, supra*.

If s. 469 is confined to cases of accident, as suggested by Meredith C.J.C.P. in *Dick v. Township of Vaughan*, *supra*—and in certain of the subsections of s. 469 “personal injury” and “the person injured” are referred to—and the judgment of Mulock C.J. in the *Strang* case is not to be followed, then, unless the cessation of work upon the construction, and the lack of maintenance, of the 40-foot strip in question can be held to constitute a nuisance, damages in the present instance would not seem to be recoverable. The weight of authority is that the facts of the present case bring it within the ambit of s. 469 of the statute.

The notice provided for by s. 469(4), is, in my opinion, not required under the circumstances as they exist in the present action, and it was held in *Strang v. Arran*, *supra*, that notice was not necessary. In *Trueman v. The King*; *Dewan v. The King*, [1932] O.R. 703, [1932] 4 D.L.R. 676, it was said that a municipality is not liable unless it has had notice or knowledge or such time has elapsed as would have enabled it to discover the defect. See also *Longbottom v. The City of Toronto* (1896), 27 O.R. 198; *The City of Kingston v. Drennan* (1897), 27 S.C.R. 46; *Weir v. Township of Turnberry*, [1931] O.R. 309, [1931] 3 D.L.R. 255 (reversed on another point, [1932] O.R. 692, [1933] 1 D.L.R. 23).

As to the plaintiff being excluded from access to his land unless the 40-foot strip is made into a passable road, the fact is that the plaintiff is not wholly excluded from his land, but his present access is to one end of his farm, while his residence happens to be at the opposite end, there being no proper road, according to the testimony of the plaintiff, from the highway to his residence.

The convenient road which the plaintiff formerly used for access to his residence was a private road which has been closed by the owner. In *In re McArthur and The Township of Southwold* (1878), 3 O.A.R. 295, it was held that a municipality must not close a road so as to exclude a person from access to his land, or residence, but we have not such a condition in the present case. Here the defendant did not close a road which was formerly in a condition to be used, and thereby exclude the plaintiff from access. See also *Re The Credit Foncier Franco-Canadien and The Village of Swansea*, [1940] O.W.N. 53, [1940]

1 D.L.R. 446; *The Trusts and Guarantee Company Limited v. The Township of Toronto*, [1942] O.R. 68, affirmed [1942] O.W.N. 234.

His Honour the County Court Judge in his report states that there should be an appropriate order that the strip of land in question be made into a reasonably passable road. It is well established that a municipality cannot be ordered by *mandamus* to repair a highway, and that the only remedy is in damages: *Cummings v. Dundas*, *supra*, and the cases mentioned in the judgment of Mulock C.J. in that appeal.

I have concluded that the plaintiff is entitled to damages, but that the recovery of damages can only be those sustained, as was said in *Strang v. Arran*, during three months less one day prior to the time action was begun. The trial judge was of the opinion that for the past four seasons the plaintiff's damages would be the amount of \$400. A season is a period of three months, regarding a year as comprising four seasons. Four seasons would equal twelve months. If the amount of damages for that period is \$400, it would be the sum of \$100 for three months.

The report of the trial judge should be varied by eliminating the order directing the defendant corporation to repair the road in question, and by reducing the damages to \$100. Because of the reduced amount of damages the plaintiff would be entitled to costs only upon the Division Court scale, but there should be no set-off to the defendant.

Report varied accordingly.

Solicitor for the plaintiff, respondent: James A. Maloney, Renfrew.

Solicitor for the defendant, appellant: James A. Howard, Eganville.

[MACKAY J.]

Johnson et al. v. The Town of Dundas.

Waters and Watercourses—Municipal Liability for Accumulation and Diversion of Water—Flooding of Land, Increased by Excess Water Collected by Municipality—Apportionment.

A municipality has no right to collect in artificial channels upon its streets and highways mere surface water distributed as rain and snow over large districts, without taking adequate means for preventing it from overflowing on to the premises of private owners.

Where a plaintiff's land has been flooded after an unusually heavy rain, and it appears that the flooding has been augmented by municipal works of this character, the municipality will be liable, notwithstanding that the plaintiff's land would have been flooded in any case, for the excess of such flooding resulting from its own wrongful acts.

AN ACTION for damages for the flooding of the plaintiffs' land. The facts are fully stated in the reasons for judgment.

June 1944. The action was tried by MACKAY J. without a jury at Hamilton.

G. W. Mason, K.C., and *R. W. Treleaven, K.C.*, for the plaintiff.

J. R. Cartwright, K.C., and *J. E. Robinson*, for the defendant.

24th July 1945. MACKAY J.:—The plaintiffs are residents of the town of Dundas in the Province of Ontario, and the defendant is a municipal corporation in the said Province.

The plaintiffs are owners of certain real estate in the said town of Dundas, which they purchased in 1926. The plaintiff Arthur Johnson carries on business on the said premises as a florist and owns and operates certain greenhouses and grows in the said greenhouses, and on the adjoining land, plants, flowers and shrubs.

Adjacent to the said property of the plaintiffs is an open ditch or creek known as Sydenham Creek in which ditch or creek water from the town of Dundas and nearby territory is carried until it finds its outlet in what is known as the Big Creek on the south side of the town.

In 1927 the Corporation of the Town of Dundas obtained a private Act, which is c. 105 of the Ontario statutes of that year. Section 2 of that Act gave power to the Town, in order to prevent damage to property caused by flooding, to construct any drain or ditch, to deepen, straighten, widen, remove obstructions in, and otherwise improve any stream, creek or watercourse. The Town did not pass a by-law under the power thus acquired

until 8th June 1942, namely, Town of Dundas By-law No. 1252 A., Ex. 28 in this action.

In 1928 there was a flood which carried a large volume of water and subsequently the Town caused to be dredged certain obstructions and deposits which had accumulated in the bed of Sydenham Creek. In 1930 the Town caused to be built certain walls below or south of the York Street bridge. In 1930 the plaintiffs erected other greenhouses, and in subsequent years other buildings.

In 1937, and again in 1938, there was flooding, which as before would have disturbed the plaintiffs very little, but it is alleged that owing to the raising of a highway the water was diverted from its usual course and on to the property of the plaintiffs.

Between the years 1929 and 1942 no dredging of any kind was done except under certain bridges. The evidence as to the extent and character of such dredging is vague, shadowy, conflicting and altogether unsatisfactory.

From time to time, commencing in 1930, the plaintiffs complained in writing to the mayor and council concerning the condition of the banks and walls of the creek (see Ex. 3, dated 5th June 1930).

Some years ago the defendant constructed a substantial concrete ditch or open aqueduct running easterly and following generally the course of an open ditch which had been in existence since time immemorial. This concrete construction runs along the south side of Park Street, emptying into Sydenham Creek near the Park Street bridge. It is alleged by the plaintiffs that this concrete construction brings into Sydenham Creek a large quantity of surface water from various points in the town of Dundas, thereby increasing to a large extent the water naturally flowing down Sydenham Creek.

In 1919 the town of Dundas constructed a sanitary sewer across Sydenham Creek at York Street (see Ex. 1 and profile of same, Ex. 17) in such a way that the tile sewer or a portion of it was above the level of the bed of the creek with the ultimate result that the bed of the creek at that point and for some distance up-stream was raised accordingly.

It is alleged by the plaintiffs that the raising of the roadbed of York Street near Park Street, and the construction of a side-

walk on the south side of York Street, diverted water, on the overflowing of Sydenham Creek, on to the property of the plaintiffs.

On the morning of Saturday 30th May 1942, during and following a severe rainstorm, the said Sydenham Creek overflowed its banks and flooded the property of the plaintiffs, thereby causing them severe damage in the destruction of their greenhouses, and the loss and devastation of a large part of their season's flowers, plants and shrubs. In short, the plaintiffs allege that the said flooding was the result of the negligent and wrongful and illegal acts of the defendant, whether purporting to be done pursuant to the provisions of The Town of Dundas Drainage Act, 1927, 17 Geo. V., c. 105, or otherwise, in the following particulars:

(a) in negligently allowing the said Sydenham Creek to become filled up at numerous places with boulders and other debris;

(b) in failure to keep the banks of the said Sydenham Creek in proper repair after having undertaken to repair and maintain the said banks;

(c) in adding to the waters which would naturally flow through Sydenham Creek by bringing into Sydenham Creek extra waters in sufficient quantities and at an accelerated rate, thereby causing Sydenham Creek to overflow its banks;

(d) in ignoring the repeated warnings given to the defendant that damage was resulting and greater damage would result from the situation created by the defendant.

The plaintiffs called William McGeorge, C.E., O.L.S., and Gordon A. Macdonald, C.E., Engineer for the Village of Swansea from 1927 to the present time, who has wide experience in municipal engineering and drainage problems, extending over many years. The defendant called two civil engineers, Norman MacRostie, C.E., B.Sc., and Colonel E. G. Mackay, C.E., O.L.S., both of whom also have had wide experience in drainage problems for various municipalities for over twenty years.

I confess that a theoretical and academic dissertation between and among engineers advocating or at least advancing conflicting theories is not materially helpful from a practical point of view. There are, however, some points enunciated where the views of all the engineers were in agreement and accord, in principle and effect.

In order to allow the facts to speak to the issue, I think it is wise to touch on certain aspects of the evidence concerning which there is no, or at any rate very little, serious controversy.

First: The plaintiffs were flooded on the morning of 30th May 1942. They were flooded by waters which came from Sydenham Creek. There was rain on the night of May 29-30, and a heavy rain, some witnesses called it a downpour, between 5 and 6.30 a.m. on the 30th. The water broke through or overflowed the banks of Sydenham Creek at three places, indicated clearly on Ex. 1 and Ex. 30.

Second: Two of these breaks or overflowings were north of Park Street and one was to the south, the ones north of Park Street being one on the east bank and one on the west bank, and the break or overflowing to the south of Park Street being on the east bank.

All the breaks were on private property and not on the property of the Town of Dundas.

It is clear that the plaintiffs had been flooded to some extent on other and earlier occasions. The York Street sanitary sewer was laid in place in 1919, and it is admitted that this sewer caused an obstruction of 11 inches above the bed of the creek. The Park Street ditch was concreted in 1932, and certain other changes coincident with the concreting were made at the same time.

The sidewalk on York Street was raised in 1940, and the pavement was raised to permit a culvert to go under Park Street some time before 1940. A ditch ran along the south side of Park Street in generally the same position, although not throughout its entire length in its present condition, for more than fifty years. The volume of water carried by the old natural ditch is distinctly in issue. The creek was not dredged from 1929 until some time in 1942, which was after the flooding in question.

The following controversial matters of fact call for careful consideration and decision:

At what time was the property of the plaintiffs flooded on the morning of 30th May?

Was the property of the plaintiffs flooded from the break south of Park Street or from the break or breaks north of Park Street?

If from points both north and south of Park Street, which flooding was first in point of time?

What was the cause of the flood from the break south of Park Street?

I find as a fact that the water overflowed or broke through the east side of Sydenham Creek south of Park Street about 6.40 a.m., and the second flood from the same point about 7.10 a.m., and that these floods preceded the breaks in the east and west banks of Sydenham Creek north of Park Street.

I also find that the overflowing on the east and west banks of Sydenham Creek occurred sometime between 7.20 and 8 a.m. I further find that some of the waters from the breaches north of Park Street reached the premises of the plaintiffs. Clearly the first flooding of the plaintiffs' property was the result of the breach or overflowing in or over the east bank of Sydenham Creek south of Park Street, and I find that this flooding occasioned the damage suffered by the plaintiffs.

I prefer to accept the evidence of Edward Dunn and the plaintiff Arthur Johnson to that of the mayor and the Town employees, Scott and Mackie.

I now come to a consideration and determination of the effective cause or causes of the flooding of the plaintiffs' property. In the view of Mr. McGeorge, the flooding of the plaintiffs' property was due to:

1. Diversion of water by means of the Park Street drain into Sydenham Creek, at a point above the plaintiffs' property, including the changing from a natural creek to that of a concrete bed.
2. Construction of a sanitary sewer at York Street in such a manner as to interfere with the flow of water in the creek.
3. The raising of York Street and its sidewalk.
4. The failure to maintain the channel in the creek in such condition that it would operate to full capacity.

In the view of Gordon A. Macdonald the flooding is attributable to:

1. The discharge from the concrete box and improved area it served increased the flow at the point of discharge. The "run-off" in this improved area is $2\frac{1}{2}$ to 3 times greater than it would be in its natural state.

2. Alteration of the grade of the sidewalk on York Street which concentrated flood waters opposite the plaintiffs' property.

3. Raising of the creek bed at the York Street bridge.

4. The low elevation of the east bank of Sydenham Creek south of the Park Street bridge, including the lack of capacity of the creek at that point.

Norman MacRostie attributes the flooding to:

1. Lack of capacity of Sydenham Creek to take such a storm.

2. Inability of the creek to take water coming down, resulting in the overflow of the bank, and in his opinion the water overflowing Sydenham Creek north of Park Street on the east bank contributed to the water which did the damage to the plaintiffs' property.

The opinion of Mr. MacRostie as to water coming east in Park Street ditch is that it would have very little effect, if any, on the damage done by the overflow of Sydenham Creek to the property of the plaintiffs. He is of opinion that the water coming from the east bank north of Park Street bridge caused the damage, and that the water coming down Park Street alone was not sufficient to do the amount of damage that was done.

Mr. MacRostie is further of opinion that the peak flow of the Park Street ditch occurred one-half hour earlier than that of the creek. He says further that in his opinion the diversion of water by means of the Park Street ditch was not a contributing cause of the damage inasmuch as he, having postulated that the damage was caused by the overflowing north of Park Street bridge, avers that the water coming from the concrete box would have no effect up-stream as far as the point of overflow northerly. Mr. MacRostie's opinion is that the construction of the sanitary sewer at York Street, namely 11 inches, is of no importance because of the rapid discharge of the water south of the bridge. He says further that in his opinion the raising of the road and the construction of the sidewalk acted rather as a barrier or protection to the property of the plaintiffs. He agrees with Mr. McGeorge and Mr. Macdonald that failure to maintain a proper channel in the creek is a contributing cause, but later modifies his opinion as to the concrete box as follows: "If there was an overflow due to discharge from concrete box, it was not

enough to damage the property of the plaintiffs." Later he says "If creek at bridge and box full to capacity for 125 feet back, the height of bank required would be 3 feet. If substantially under 3 feet there would, under those conditions, be flooding."

Colonel Mackay's evidence is in some respects substantially in accord with that of Mr. MacRostie, but he is more restrained in his opinion, and in my opinion is a much more helpful witness. He says: "I consider that the cause of the Sydenham Creek overflowing its banks is the lack of capacity of the creek to carry the water. Where the water left the bank, the bed of the creek was raised by deposit, etc. There was a slight change of course where the creek overflowed its banks." He is of opinion that there was no substantial diversion of water from its natural course, the Park Street ditch, and gives as his opinion that the two peaks did not synchronize. This opinion is qualified as follows: "If, however, the rain fell over an extended time, it may well be that they did at some time synchronize."

Having regard to all the evidence, I cannot conclude otherwise than that the peak flows of Sydenham Creek and the Park Street ditch did, at some time that morning, synchronize. It was reassuring to hear Colonel Mackay say that theory is insufficient in determining peak flows. In order to base an intelligent opinion one must know all the factors. He frankly says that he is unable to say what water reached the property of the plaintiffs first.

I am of opinion from the evidence—from a study of Ex. 1 and Ex. 30—that the Park Street ditch, with its concrete box, diverted substantial water from its natural course into Sydenham Creek and that such excess or additional water, commingling with the capacity flow of Sydenham Creek, was an effective, substantially contemporaneous, contributing cause of the flooding of the plaintiffs' property from a point on the east bank of Sydenham Creek south of the Park Street bridge.

There was also some flooding of the plaintiffs' property subsequently, I do not know to what extent, from the breach or breaches of Sydenham Creek banks north of the Park Street bridge.

On the evidence the alteration of the street and building of the sidewalk may very well have changed the flow, diverting

some of the volume of water from the premises of Watson, an adjacent property, to that of the plaintiffs.

I am of opinion this construction, notwithstanding the evidence that it was in accordance with recognized engineering practice, was a factor in diverting the flow of water from its natural course to the premises of the plaintiffs.

The construction of the sanitary sewer at York Street bridge, namely, the raising of the creek bed under the York Street bridge 11 inches, is a factor, but only a small factor. I am inclined to accept, and do accept, the evidence of Colonel Mackay that "The maximum effect upstream in twenty years would be 100 feet or a little better." Its effect, therefore, at the point of overflow on the east bank of Sydenham Creek south of Park Street bridge would, in my opinion, be negligible, and can for all practical purposes be disregarded. Clearly one of the causes of flooding was the failure to maintain the channel in the creek in such condition that it would operate to full capacity.

Mr. Cartwright contends that the defendant has acquired a prescriptive right to maintain a ditch along the south side of Park Street. The defendant has alleged a prescriptive right in its pleadings. Has it been established? I think not. The defendant must show the circumstances under which the prescriptive right arises; it has to show the time at which it arises; it has to show the compass under which it arises and its quantity and extent. None of these necessary postulates has been proved. All the defendant has done is to call certain elderly gentlemen of whom its counsel asked these questions:

Q. Was there a ditch there for a long time? A. Yes, 40 to 55 years.

Q. Is the ditch in the same position? A. No, we cannot say that it is.

Q. Are you able to say it is the same size? A. No.

Mr. MacRostie was asked what he knew about it, and his answer was: "I haven't sufficient information. I don't know enough about the capacity of the ditch."

I am of opinion that before a prescriptive right can arise against the plaintiffs, the defendant must show that for the period of time required by The Limitations Act, R.S.O. 1937, c. 118, it has discharged water into the stream in such a way as

to cause flooding upon the premises of the plaintiffs and unless it shows that it has exercised the right to flood such property by pouring water into the creek from the ditch, there can be no prescriptive right.

I am of opinion that the damages sustained and suffered by the plaintiffs were caused by the flooding from the breach in the bank of Sydenham Creek south of the Park Street bridge.

Mr. Cartwright contends that the plaintiffs would have sustained the same devastation of property as a result of the later flow from points north of the Park Street bridge, which flow was of substantial volume. He cites a number of cases to support his argument that the only damage recognizable in law is that of the time that elapsed between the southerly and the northerly flooding.

I am of opinion that, admitting for the moment that this contention is maintainable in law, he has failed to show that such a result was certain or reasonably probable. I cannot so conclude from the evidence, and speculation on such a matter would be imprudent, unwise and unjust.

Mr. Cartwright quoted from Prosser on Torts, 1941, and cited an article by Chief Justice Peaslee of New Hampshire, referred to in that work at p. 337, as follows:

"In the case which prompted the article, a boy standing on the high beam of a bridge trestle lost his balance and started to fall to substantially certain death or serious injury far below. He came in contact with defendant's wires, and was electrocuted. The incipient fall was an accomplished fact before the defendant's negligence caused any harm at all. The court allowed damages only for such sum as his prospects for life and health were worth when the defendant killed him."

The distinction in the case at bar is obvious. In the citation given by Mr. Cartwright the facts reveal that all that occurred was an acceleration of certain death or serious injury in the course of a single circumstance, namely, the fall. In the case at bar the overflowings are distinct and separated by a substantial period of time, and the occurring of one in no way makes certain or even highly probable the happening of the other.

A hurried review of cases in my opinion indicates that:

"Cities and towns have no greater right than individuals to collect in artificial channels upon their streets and highways

mere surface-water, distributed in rain and snow over large districts, and precipitate it upon the premises of private owners." *Scrimger v. Town of Galt* (1914), 6 O.W.N. 75 at 77, 26 O.W.R. 53, 16 D.L.R. 867; see 11 C.E.D. (Ont.) p. 85.

In *Rudd v. Town of Arnprior* (1921), 20 O.W.N. 261, Meredith C.J.O. said:

" . . . [The corporation] had no right, by its works, to collect surface-water from the surrounding neighbourhood, which but for those works would not have come to John street, and to bring it on that street, without providing adequate means for preventing it overflowing the lands of the respondent." See *Campbell v. Township of Morris* (1923), 54 O.L.R. 358 at 366.

In *McGuire v. Township of Brighton* (1912), 4 O.W.N. 137, 23 O.W.R. 223, 7 D.L.R. 314, a judgment of the Court of Appeal, Mulock C.J. Ex. D. says:

"Mr. Porter relies on what is, we think a correct statement of the law, the proposition of law that the defendants have the right to drain surface-water into the creek in question, it being a natural watercourse, . . . according to its natural capacity, it can take care of. He did not elaborate the proposition thus fully, but what I have said is a fair paraphrase of the proposition.

"According to Mr. Porter, the evidence shews that, before the defendants drained any surface-water into the watercourse, it periodically overflowed its banks. It is still in its normal condition, having never been deepened or had its capacity increased. It, therefore, must follow that, when the defendants brought into it a larger volume of water, they increased the overflow; and, thus increasing the over-flow, they are liable for doing what they have no right to do, namely, turning into this watercourse a volume of water in excess of its natural capacity."

In *Martin v. County of Middlesex* (1913), 4 O.W.N. 682, 23 O.W.R. 974, affirmed 4 O.W.N. 1540, 24 O.W.R. 869, 12 D.L.R. 246, a case where the defendants interfered with a part of the area through which the waters of a natural watercourse ran, Sutherland J. says:

"In these circumstances, they were required to take the very greatest precaution. While the course they followed appeared to be a reasonable one, and was, no doubt, undertaken in good faith, it nevertheless was defective, and the injury sustained by the plaintiff flowed from these defects."

A leading case is *Geddis v. Proprietors of the Bann Reservoir* (1878), 3 App. Cas. 430, a decision of the House of Lords. There, a local Act of Parliament authorized certain persons whom it incorporated to do what was necessary to secure a supply of water to certain mill owners whose mills were on the bank of a stream.

The second clause of the Act authorized them to make, erect, and so on, by means of a reservoir, a due and adequate supply of water at all seasons, and they had authority to deepen and cleanse and keep the watercourses in order; they collected the water of different streams and sent them through a channel, which we will call for convenience River Muddock, in order to supply the river; and after a time they neglected to cleanse the channel of the Muddock, so that it overflowed its banks and did damage to the proprietors.

Now, the question that arose was whether in the circumstances that existed there (and it requires some care and time in analyzing them) there was any obligation upon the proprietors of the reservoir to keep in adequate repair this Muddock portion of the watercourses; and the question is dealt with specifically at p. 447, in the judgment of Lord Hatherley. He says:

"That, my Lords, shews the course intended by the Legislature to be taken by the Respondents, that they should have full power of bringing this water into the lough, and that they should have the duty imposed on them of sending back at least as much as they take. There being nothing to prevent their sending down as much more as they think proper, and they having the express injunction laid upon them to make a communication between the lough and the *Muddock* for the purpose of restoring to the *Muddock* that which they have taken from it, it follows plainly that they would have the power of making use of the *Muddock* as the aqueduct or watercourse through which the water may be conveyed to the *Bann* [that is, to the main reservoir]; and having power so to make use of it, they would have the power to scour and cleanse it from time to time; and if they have the power of so cleansing it, it appears to me, my Lords, that a person who is injured by their introducing the water in the manner in which it has been introduced, that is to say, not by a natural flow, and at such times and in such quanti-

ties as it had been accustomed to come down the *Muddock*, but in the quantities and at the times required, in order to carry out the duties imposed upon them by the Act of Parliament, were bound to keep clear the channel they had so provided and used in order that they might not, by reason of the additional amount and quantity of water they so sent down, and by reason of the mode and times in which they sent it down, occasion the damage which has been occasioned to the Plaintiff."

It seems to me clear that if there is interference with the stream, there are certain things that the defendant can do and should do for the purpose of offsetting the injury it may cause by its own acts; with reference to the sanitary sewer, the effect of which I earlier indicated may be negligible, nevertheless it may very well be that, to offset any effect which this raising of the bed of the creek occasioned, the banks should be raised accordingly. This, I assume, is not based upon any question of original liability to repair, but is based on the question of the municipality having done an act that would otherwise be unauthorized, and if they do that act and take the benefit, they may very well be bound to take some measure of precaution in order that people will not be injured unnecessarily by the exercise of those powers.

The general proposition referable to interference with the bed of a stream is set forth in *Corporation of Greenock v. Caledonian Railway Company*; *Corporation of Greenock v. Glasgow and South-Western Railway Company*, [1917] A.C. 556. The proposition in that case is that the duty of any one who interferes with the course of a stream, which means obstruction or diversion, or indeed anything that affects its course, may be liable for ultimate consequences. The headnote of the *Greenock* case is as follows:

"It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable."

This is a judgment of the House of Lords, with Lord Finlay L.C., Lord Dunedin, Lord Shaw of Dunfermline, Lord Parker of Waddington and Lord Wrenbury, present.

In the case at bar the Town does something to the bed—substitutes something for it—and if the damage results from the deficiency of the substitute, in other words if the Town has erected something that does not maintain its efficiency, then it may be liable.

In the *Greenock* case the municipal authority had built a pond for children to paddle in, in a park, and they obstructed the natural flow of the water from the stream which they used to feed it, and there was a very heavy rainfall, one of extraordinary violence. The stream overflowed and a lot of water which would have been carried by the stream, had it not been interfered with, got down into the town and damaged property, and it was held, under principles enunciated there, that the defendants were liable. Lord Finlay, at p. 572, in the third paragraph, sets out in precise language the effect of the language quoted from the headnote.

Hurdman v. The North Eastern Railway Company (1878), 3 C.P.D. 168, may be briefly summed up by abbreviating the second paragraph on p. 173:

“The heap or mound on the defendants’ land must, in our opinion, be considered as an artificial work. Every occupier of land is entitled to the reasonable enjoyment thereof. This is a natural right of property, and it is well established that an occupier of land may protect himself by action against any one who allows any filth or any other noxious thing produced by him on his own land to interfere with this enjoyment. We are further of opinion that, subject to a qualification to be hereafter mentioned, if any one by artificial erection on his own land causes water, even though arising from natural rain-fall only, to pass into his neighbour’s land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured.”

I fancy that few cases of this kind are determined without reference to the very old case of *Sir Neil Menzies, Bart. v. The Earl of Breadalbane et al.*, reported in (1828), 3 Bligh N.S. 414, 4 E.R. 1387, the headnote of which is as follows:

“A proprietor of land on the bank of a river, having commenced the building of a mound, which according to the opinion and report of an engineer, would, if completed, in times of ordinary flood, throw the waters of the river on the grounds of

a proprietor on the opposite bank, so as to overflow and injure them, was restrained by perpetual interdict, from the farther erection of any bulwark, or other work, which might have the effect of diverting the stream of the river in time of flood from its accustomed course, and throwing the same upon the lands of the Appellant."

See *Smith v. Township of Eldon* (1907), 9 O.W.R. 963, and *Jolicour v. Town of Cornwall* (1913), 1 Sm. & S. 220.

The headnote to *Law v. The Town of Niagara Falls; Bamfield v. The Town of Niagara Falls* (1884), 6 O.R. 467, is:

"Many years before the defendant municipality was laid out, a culvert was constructed by Z. on private property for the benefit of a railway company whose lands adjoined the stream in question. By reason of the culvert, the water brought down by the stream was not carried off, but overflowed the plaintiff's land. The stream was the natural drain for the surrounding country, but the defendants used it to a small extent for the drainage of the town. It was found that the flooding would not have been occasioned by the water brought down through the defendants' user of the stream, but that water brought down from the area drained, apart from the defendants' user, would have alone caused the damage."

At p. 469, the late Mr. Justice Rose, writing the decision of the Court (the other members were Chief Justice Cameron and Mr. Justice Galt), said:

"It is clear, as a matter of law, that the municipality is not bound to provide drainage for the property within its limits; that if it construct drains or sewers to gather up the water, and they are so negligently constructed, or knowingly permitted to fall into or remain in a state of disrepair, or to be obstructed so as to prevent the water so gathered up finding a proper outlet, and thereby such water is brought upon property upon which it would not otherwise come, they are responsible for such damages as may ensue. In this case the defendants did not construct the sewer; it was not on their property; they had no control over it. The strongest position the plaintiffs can assume here is, that knowing the culvert to be insufficient in size to permit all the water flowing down the creek to find an outlet, they drained into it water which would not have otherwise flowed therein, and are liable for damage consequent upon the overflow.

"Mr. Kerr pressed his argument to the length of urging that it was not necessary for the plaintiff to prove that such water so brought in by the defendants caused damage, but only that the stream or flood to the waters of which they contributed caused the damage, and cited a number of cases. I have referred to them all, but no case goes that length.

"It is clear that if the culvert had been sufficient to carry off the water which flowed through it before the additional water was brought into it, and was not sufficient to carry off the additional water also, the party bringing in the additional water would be liable. That was the case in *Northwood v. The Township of Raleigh* (1882), 3 O.R. 347." And later at the foot of page 470:

"To give effect to the plaintiff's contention would be to hold that if a man threw a gallon of water into a swollen stream, he could not be heard to say that the gallon of water was not the water which caused the damage. The damage caused by the additional water must be 'appreciable'."

I now review some of the authorities referable to the necessity for apportionment in the degree of the responsibility when it appears that the additional flow was an appreciable or substantial cause.

In the case of *Malott v. The Township of Mersea* (1885), 9 O.R. 611 (a judgment of the late Mr. Justice Thomas Ferguson), the headnote is as follows:

"When M. brought action for an injunction against a municipal corporation for that by reason of certain drainage works constructed by them the defendants had caused an increased quantity of water to flow into a creek running through his lands which were situate in an adjoining township, and which had consequently been flooded and damaged, partly from the excess of water sent into the creek, and partly from the increased velocity imparted to the flow of water into the creek,

"Held, that M. was entitled to an injunction restraining the increased flow of water into the creek, and also the increased velocity, and to a reference as to damages, and that he was not bound to proceed by way of arbitration."

At p. 614 the point of apportionment appears:

"I am of the opinion that the plaintiff is entitled to a reference to the Master at Chatham, to ascertain the amount of the

damages that he has sustained by reason of the excess of flooding to his land occasioned by the excess of water sent down by the Dale drain by means or by reason of the extension and deepening aforesaid, taking into account the difference of the velocity with which the water is delivered into the ravine and hence into Two Creeks, and to an order against the defendants."

It is clear here that the liability for the damages sustained is governed not solely by the flooding that the plaintiff had suffered, but by the excess of flooding, it appearing that in any case he would have been flooded. See also *Rudd v. Town of Arnprior*, *supra*. In that case a reference was directed, and I refer to the concluding paragraph of the judgment at the top of p. 263:

"It will of course be open to the appellant corporation on the reference to shew, if it can, that waters that have flowed upon the respondent's property would have done so if the works it had constructed had not been constructed."

Cardwell v. Breckenbridge (1913), 4 O.W.N. 1295, 24 O.W.R. 569, 11 D.L.R. 461, deals with apportionment. It is a lengthy judgment of the late Mr. Justice Hodgins, where reference is made to many cases. The headnote in O.W.R. is:

"Held, that an easement to pen back the water of a stream and to cause flooding to riparian owners can be acquired by user of the stream in this manner continuously or at regularly recurring intervals for a period of 20 years, but that the extent of the right acquired must be measured strictly by the extent of the user.

"Review of authorities.

"That therefore an easement by mill-owners to pen back and utilize the spring freshets and such summer rains as would be extensive enough to warrant user, did not justify the storing and conservation of such water as was collected to greatly prolong the period of user beyond the termination of the spring freshets, and so extend the period of flooding of the servient tenements."

I am of opinion that this case is authority for the principle that where not the whole of the flooding has been caused wrongfully, but there has been merely an excess, the damages are not the whole damage but only the excess over what might lawfully have been done by other causes.

The matter of prescription has been dealt with earlier in this judgment, and repetition is unnecessary and undesirable.

The following cases have been examined: *Township of West Flamborough v. Pretuski*, 66 O.L.R. 210, [1931] 1 D.L.R. 520; *Attorney-General v. Copeland*, [1902] 1 K.B. 690. *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, has been referred to in scores of cases. It appears to be authority for the principle that at common law there is no liability for non-feasance.

Under the authority of *Bank View Mill, Ltd. et al. v. Nelson Corporation et al.*, [1943] 1 All E.R. 299, I am of opinion that the defendants were not in occupation of the sanitary sewer under Park Street. In that case the corporation had full statutory power to do all sorts of things in a stream, including the removal of weirs, and it was found that the flooding was caused by certain weirs which were in the stream; and it was argued that having the power to remove the weirs, the corporation owed a duty to remove them and so prevent the flooding, and as they laid a culvert in the bed of the stream they were in occupation of the bed of the stream and therefore the weirs committed a nuisance. This was rejected by the Court. At the foot of p. 303, Lord Greene M.R. says:

"The fallacy underlying this attempt to combine the corporation's statutory power to remove obstructions with the alleged possession or occupation in order to impose upon the corporation a duty to exercise its statutory power can, I think, be exposed in another way. If the corporation were in fact in possession or occupation of the bed of the stream including the offending weirs (e.g., if it had acquired those rights by purchase), its liability in respect of flooding caused by the artificial damming of the water would have arisen from the fact of its possession or occupation. It would have been in precisely the same position as any other person in possession or occupation of a watercourse who artificially accumulates the water and then allows it to escape on to his neighbour's land. The obligation to remove the obstructions would not have arisen in any way from the existence of the statutory powers, nor would the obligation have been an obligation to exercise those powers. The obligation to remove the obstructions would have existed if the statutory powers had never been granted.

"I have said that no authority was cited in support of these novel propositions."

I refer to the judgment of Lord Romer in *East Suffolk Rivers Catchment Board v. Kent et al.*, [1941] A.C. 74, the headnote of which is as follows:

"Where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise the power. If in the exercise of its discretion the authority embarks upon an execution of the power, the only duty owed to any member of the public is not thereby to add to the damages which that person would have suffered had the authority done nothing. So long as the authority exercises its discretion honestly, it can determine the method by which, and the time during which, the power shall be exercised; and it cannot be made liable, except to the extent just mentioned, for any damage that would have been avoided if it had exercised its discretion in a more reasonable way."

Considering the evidence in its entirety; disregarding certain evidence earlier referred to, not accepted by the Court; and upon a review of the authorities, I am of opinion that the defendant is liable by way of apportionment for the excess water brought into Sydenham Creek and for the additional acceleration of such water at the junction of the Park Street ditch and Sydenham Creek.

I shall not repeat the findings of fact made during the course of this judgment, but upon such findings I am of opinion that a just and proper apportionment of excess water, together with its acceleration, represents 30 per cent. of the damage caused to the plaintiffs. The total damage claimed by the plaintiffs in their statement of claim is \$6,000. In reply to a demand for particulars of such damages, the plaintiffs particularized their claim in an aggregate of \$6,746. If the defendant is willing to accept such particularization to the amount of \$6,000, as set forth in the plaintiffs' statement of claim, then it will be unnecessary to have a reference before the Local Master of the Supreme Court at Hamilton. Otherwise such reference must be had.

There will be judgment, subject to what I have just said, for the plaintiffs, for \$1,800 and costs.

Judgment accordingly.

Solicitors for the plaintiff: Treleaven & Treleaven, Hamilton.

Solicitors for the defendant: Robinson & Robinson, Dundas.

[HOPE J.]

**Gray v. Yellowknife Gold Mines Limited and Bear Exploration
and Radium Limited.**

Companies—Directors—Powers and Duties—Transactions with Other Companies in which Directors also Interested—Interlocking Directorates—Special Provisions in By-laws—"Indoor Management"—Presumption, in Favour of Outsiders, that Directors Validly Elected—Position of Director Taking Part in Transaction and later Attacking it as Illegal—The Companies Act, R.S.O. 1937, c. 251, ss. 90, 93.

A contract between two companies having interlocking or identical boards of directors is not necessarily and *ipso facto* void. The general rule which prohibits a director of a company from entering into any engagement in which he may have a personal interest capable of conflicting with the interest of his company, as laid down in *Aberdeen Railway Company v. Blaikie, Brothers* (1854), 1 Macq. 461 at 471 (which was extended, in *Transvaal Lands Company v. New Belgium (Transvaal) Land and Development Company*, [1914] 2 Ch. 488, to contracts with another company in which the director is a shareholder), is subject to the provisions of the by-laws or articles of association of the company. *North-West Transportation Company Limited et al. v. Beatty* (1887), 12 App. Cas. 589 at 601, and other authorities, applied. Where, therefore, the by-laws of a company expressly provide that no contract between the company and any other corporation shall be affected by the fact that a director of the company is interested in, or a director of, the other corporation, the common law rule is excluded, at least in the absence of fraud or dishonesty, or of a secret profit to the director in question. Nor is such a contract, where there is such a provision in the by-laws, avoided by s. 93 of the Ontario Companies Act, which allows more latitude than most of the provisions found in the articles governing English companies. *Roxborough Gardens of Hamilton Limited v. Davis* (1920), 46 O.L.R. 615 at 631, applied.

An outsider, dealing with a *de facto* board of directors, where all the statutory requirements in connection with their election appear to have been complied with, is entitled to assume that the board has been validly elected, and a company cannot escape liability upon an agreement executed under its common seal on the ground that its directors have not been regularly elected. *Re W. N. McEachren & Sons Ltd.; McGibbon v. The Imperial Trust Co.*, [1933] O.R. 349, applied. Any insufficiency in the notice sent to shareholders before a meeting is a matter of "indoor management" only, and cannot militate against outsiders dealing with the company. *The Royal British Bank v. Turquand* (1856), 6 E. & B. 327, and other authorities, discussed.

The rule is well established that a director who takes part in irregular proceedings may be estopped from setting up the irregularity, and where the director in question has been the solicitor for the company he cannot take advantage of his ignorance, negligence or fraud. *Bulkeley v. Wilford* (1834), 2 Cl. & Fin. 102, applied.

AN ACTION to set aside certain transactions between the defendant companies. The facts, and the relief sought, are fully set out in the reasons for judgment.

12th to 16th and 19th to 23rd February and 15th to 17th March 1945. The action was tried by HOPE J. without a jury at Toronto.

J. W. Pickup, K.C., and *B. R. P. MacKenzie*, for the plaintiff.
D. L. McCarthy, K.C., and *Wilson McLean*, for the defendant
Bear Exploration and Radium Limited.

G. R. Munnoch, K.C., for the defendant Yellowknife Gold
Mines Limited.

14th September 1945. HOPE J.:—The plaintiff alleges in his statement of claim that he is a farmer, but it is evident that he was formerly a practising barrister and solicitor, during which time he was actively interested in various mining promotions, and of more recent years he has been engaged almost exclusively in the activities of certain mining companies, including the promotion and management of the two defendant companies and others subsidiary thereto.

A summary of the history of the two defendant companies, the relevant subsidiary companies and the plaintiff's relation or association with these companies, is as follows:

Bear Exploration and Radium Limited, commonly referred to as "B.E.A.R." is a body incorporated under the laws of the Province of Ontario by letters patent dated 6th June 1932, with a board of five directors and empowered, *inter alia*, "(a) To acquire, own . . . develop . . . and manage mines and mineral lands . . . *whether belonging to the Company or not* . . . and (b) *To take, acquire and hold as consideration for . . . minerals sold or otherwise disposed of . . . or for work done by contract or otherwise shares debentures or other securities of or in any other company having objects similar, in whole or in part, to those of the Company hereby incorporated and to sell and otherwise dispose of the same*" (The italics are mine.)

In 1933, according to the minute books of B.E.A.R., Gray had acquired control of the company, and at the same time had the controlling interest in an earlier organization known as the Bear Syndicate, which controlled the company.

At this juncture certain sections in the by-laws of B.E.A.R. might profitably be noted. The following provision regarding directors appears (by-law no. 3):

"The affairs of the Company shall be managed by a board of Five Directors, of whom Three shall form a quorum. Every Director shall be a shareholder in the Company."

Clause 20, at p. 35 of Ex. 1, being the minute book of B.E.A.R. is as follows:

"The annual meeting of the Company, after the first one, shall be held at such time and place as the Directors of the Company may determine, to hear the report of the Directors for the past year and elect Directors for the ensuing year and for all other special purposes as provided in the statutes and for all other general purposes relating to the management of the Company's affairs. In default of other dates being fixed by the Board this meeting shall be held at the head office on the 4th Wednesday in January."

Clause 21 reads as follows:

"Subject to any statutory restriction as to holding same within Ontario all meetings of the Company, either annual, regular or special and of the Board, may be held at such place as the Directors may determine."

Clause 22:

"A general meeting of the shareholders of the Company may be called at any time by the President or by the Directors and, subject as above, for any place. No public notice or advertisement of shareholders' meetings, annual or special, shall be required, but notice by letter of the place and time of such meeting shall be mailed post prepaid to each shareholder to his last known post office address and deposited in the Post Office at least ten days before the holding of the meeting. Provided always that general meetings of shareholders may be held at any time without such notice if all the shareholders of the Company are present thereat or represented thereat by proxy duly appointed, and at such meeting any business may be transacted which the Company in general or special meeting may transact. *The accidental omission to give the notice above mentioned to any shareholder shall not invalidate any resolution passed at any meeting.*"

Clause 30:

"No shareholder shall be entitled to any information respecting any details or conduct of the Company's business which in the opinion of the directors is inexpedient in the interests of the Company to communicate to the public, and no shareholder shall have the right of inspecting any accounts, books or documents

of the Company, or minutes of directors meeting, unless authorized by directors, or by a shareholders' meeting."

The following two clauses, 54 and 55, on the subject of contracts with directors, should be noted:

"54. Inasmuch as the Directors of the Company are of diversified business interests and are likely to be connected with persons, firms and corporations with which the Company may have business dealings, *no contract or other transaction between this company and any of its directors, or between this Company and any other persons, firm or corporation shall be affected by the fact that a Director or Directors of this Company are interested in the said contracts, or in such other person, firm or corporation or are Directors thereof.* All such dealings are also subject to the statutory provisions governing the same."

"55. No Director shall be disqualified in respect of his office from contracting or entering into any arrangement with the Company, or from transacting business for the Company as a broker or agent or in any other capacity, nor shall any such contract or arrangement or transaction or any contract or arrangement entered into by or on behalf of the Company with any Company or partnership of or in which any Director shall be a member or otherwise interested be voided, nor shall any Director so contracting or entering into any arrangement or transacting such business, or being such member or so interested be liable to account to this Company for any profit realized by any such contract, arrangement or transaction by reason only of such Director holding that office, or of *fiduciary relation thereby established, provided that the nature of his interest must be disclosed by him at the meeting of the Board at which the contract or arrangement, if his interest then exists, is determined on, or is then otherwise known to the other Directors present, or in any other case at the first meeting of the Directors after the acquisition of his interest, and provided also that he shall not vote in respect of any such matters.*"

(The italics are mine throughout.)

The record, viz., Ex. 1, minutes of B.E.A.R. in which these matters appear, is signed by the plaintiff as secretary of the company.

On 28th March 1934, the other defendant company, Yellowknife Gold Mines Limited, (commonly referred to as "Yellow-

knife”), was incorporated under the provisions of the Ontario Companies Act. This incorporation was apparently at the instigation of B.E.A.R., and in the work of incorporation the plaintiff Gray appears both as a solicitor and as a director, and Yellowknife acquired some twenty-nine mining claims belonging to B.E.A.R. in the Yellowknife area, for which 1,500,000 shares of Yellowknife were issued to B.E.A.R. B.E.A.R. agreed to finance and direct development of the Yellowknife mining claims and Yellowknife agreed to reimburse B.E.A.R. for the expenditure in connection with inspection, exploitation and management of the claims. Gray was in control of both of the companies at this time.

It should be noted that, in the main, all by-laws of Yellowknife and, in particular, by-laws 54 and 55 are in precisely the same language as the by-laws of B.E.A.R. of similar numbers above quoted.

In the minutes of Yellowknife, (Ex. 2, p. 45), a by-law, no. 67, is recorded as follows:

“Be it enacted as a by-law of Yellowknife Gold Mines Limited . . . that the Board of Directors be and the same is hereby increased in number from three to five.

“Passed by the Board of Directors, this 25th day of April 1934.”

Signed with the seal of the company.

“J. Murray Anderson”

“Edna Carpenter.”

This was presumably at a meeting of directors on the 23rd April, at which time James Murray Anderson, Edna Carpenter and George Bradley were present.

At the same meeting subscriptions for one share were received from Messrs. Quarrington, Burwash, Taylor and J. J. Gray (the plaintiff herein), and one share was allotted to each of them.

Mr. Bradley resigned from the board and Gray was elected in his stead and took his place upon the board.

On the same page of Ex. 2 there is also this entry: “Unanimously affirmed by the shareholders this day of April.” The blank date space has “25” inserted in pencil and is similarly signed by Anderson and Carpenter, although at the meeting of directors on 23rd April, both Anderson and Carpenter had resigned from the board.

Later, when Mr. Lester M. Keachie and others came upon the board in 1938, as will be mentioned subsequently, the minutes of Yellowknife annual general meeting on the 23rd July 1938 recorded that the chairman outlined the purpose for which the meeting was called, advised the meeting of the change of officers and directors, and of the fact that it was deemed advisable to call a meeting of the shareholders to ratify the acts and deeds of the company to date, and to elect new directors, particularly in view of the fact that no annual general meeting of the company had as yet been held since incorporation.

At this meeting in 1938, a by-law was passed generally confirming all by-laws and resolutions hitherto passed by the directors and all agreements entered into by them on behalf of the company, and a resolution specifically confirming the above-mentioned by-law no. 67, which had been passed on 25th April 1934 "but had never specifically been confirmed by the shareholders", was passed also.

By letters patent dated 16th October 1934, Gray incorporated a further company known as "Burwash Yellowknife Mines, Limited" (commonly referred to as "Burwash"). Gray was the solicitor and a director thereof. By its letters patent, Burwash was granted precisely the same powers as those enjoyed by B.E.A.R. and Yellowknife.

By-law 54 of Burwash was precisely the same as the correspondingly numbered by-law in the two earlier companies except for the last sentence which, in Burwash, reads as follows:

"This and the next succeeding clause shall be subject to Section 95 (sub-sections 1 and 2) of Ontario Companies Act."

Again, by-law 55 of Burwash is in precisely the same language as the correspondingly numbered by-law of the other companies.

By an agreement at this time Yellowknife sold 24 mining claims known as the "Rich" group, which had been staked or acquired by Yellowknife, to the newly incorporated Burwash, and received as compensation therefor 1,500,000 shares of Burwash. Thus the position stands that B.E.A.R. had incorporated Yellowknife and had become the owner of 1,500,000 shares of Yellowknife. Yellowknife in turn had incorporated Burwash and had become the owner of 1,500,000 shares of Burwash. Burwash was ultimately wound up in January 1939, and its

charter was surrendered. The assets were dealt with as set out in Ex. 3, as appears at pp. 194, 195 and 196. No particular significance attaches thereto.

In the meantime, in 1935, because of what were apparent differences with his client whom he represented in the incorporation and control of these companies, Gray retired from the board, but in 1936, as a result of a personal settlement made, as he states, with this client, Gray in his own right acquired the control of the companies and again became active on the boards thereof.

In 1937 a further company was incorporated by Gray, known as Giant Yellowknife Gold Mines Limited. The minutes of the first meeting of this company are recorded as of the 4th August 1937, when an issue of the share capital was authorized, all fully paid up. No minutes are available for the year 1937, for B.E.A.R., Yellowknife or Burwash, but minutes were produced for Giant for the year 1937.

The absence of these minutes should be noted in connection with the activities of the plaintiff at that period.

The organization of Giant was stipulated in an agreement (Ex. 45) between Burwash, as vendor, and B.E.A.R. as purchaser, dated the 1st July 1937. This agreement was signed by Gray as a signing officer for each of the contracting companies, and contained the following recital and provision with respect to Giant:

"Whereas the purchaser [*i.e.*, B.E.A.R.] has been spending money on the property known as Giant claims numbers 1 to 20 and Giant fractional, in Yellowknife River area, N.W.T. since June 1936 and whereas the vendor [*i.e.*, Burwash] has agreed to sell the said properties to the purchaser as of June 1st, 1936; and whereas the purchaser will be responsible for all expenditures of any kind on or in connection with the said property, from and after that date.

"Now, in consideration of the premises and of the covenants and agreements herein contained made by the parties the one with the other, the parties hereto agree as follows:

"(1) The vendor agrees to sell and the purchaser agrees to purchase the 20 unpatented mining claims and one fractional unpatented mining claim in the Yellowknife River area, N.W.T. and the supplies, equipment and buildings thereon . . . for

the consideration of Nine hundred thousand fully paid shares of a company to be formed having a capitalization of three million shares of the par value of one dollar each and all being in other respects as the purchaser may determine provided such shares shall remain in pool until September 1st, 1940, or until such earlier date as the purchaser may consent to their release; provided also that the vendor shall be entitled to transfer part or parts of such shares as it may desire as long as the shares continue to remain subject to the same pooling restrictions.

“(2) The vendor agrees that the said unpatented mining claims and fractional claim shall be transferred to the company to be formed aforesaid. It is understood that the said new company shall be called Giant Yellowknife Gold Mines Limited or such other name as may be given by the proper authorities . . . The purchaser shall be at liberty to sell them for cash or shares as vendor may see fit. In selling the mining claims to the company to be formed the purchaser may bargain for a larger number of shares than the said nine hundred thousand shares but shall not take or receive more than one-half the authorized shares of the company to be formed.

“(3) The purchaser agrees that loans made to the vendor company shall be cancelled and the purchaser further agrees to pay all debts of the vendor”

“(5) . . . *It is agreed that the validity of this agreement shall not in any way be impaired by the fact that the purchaser stands in any fiduciary relationship to the vendor.*”

Again, an examination of the charter and by-laws of Giant, like the other two subsequent companies, reveals the same terms and provisions as quoted from those of B.E.A.R.

An examination of the minutes and books of account which are produced also reveals that during the years 1936 and 1937, when Gray was in full control of the companies, B.E.A.R. was apparently financing any operations in the claims of the other companies, and that from time to time Gray, either by donations or by share purchases, was contributing funds for the working of the properties of the various companies by B.E.A.R.

On 4th July 1936 (Ex. 5, p. 91) Gray is recorded as informing the meeting then held that B.E.A.R. management had undertaken the development of claims held by Burwash and Yellowknife, stating: “ . . . that the sum of \$20,000.00 paid to

the treasury by him up to and including June 15th, 1936, for no consideration, was a donation to the Company and carries with it no obligation or liability to Mr. Gray on the part of the Company."

The accounts of the company at that time indicate that this sum was carried into the accounts as a donated surplus. While this is so recorded, it is apparent that later in 1938, in seeking a settlement for advances made to B.E.A.R., Gray sought to disregard his own recording of this \$20,000 transaction as a donation and sought repayment of it in Yellowknife shares, and did in fact receive payment of this \$20,000 from B.E.A.R. in Yellowknife shares. This repayment is recorded in the B.E.A.R. minutes of 25th April 1938, Ex. 5, p. 98, when Gray applied for and received 75,000 shares at 20 cents per share.

The shares of B.E.A.R. had been listed and traded in on the stock exchange in 1934, and had continued to be so traded in until October 1936, when, for reasons associated apparently with the plaintiff and his operations of the companies, the stock exchange determined to delist the shares in B.E.A.R. This rendered his financing of the companies even more difficult for Gray, and it is very evident that by April 1938 the company, B.E.A.R., was in financial difficulties, and apparently owed substantial sums to various creditors which it was unable to pay. Gray was at that time admittedly the largest shareholder and was also the largest creditor of the company. This is evidenced by the recitals and terms contained in an agreement dated 28th July 1938, Ex. 37, between Gray, B.E.A.R. and two companies known as Chickasaw and Yukon Yellowknife, both of which I shall mention subsequently. In this agreement Gray's status is set out as mentioned, and it is also recited that he was desirous of reducing the liabilities of the company and putting funds in the treasury of B.E.A.R. for two purposes, *viz.*: (1) to enable the company to carry on its operations; and (2) to increase the value of the shares owned by Gray (*vide* Ex. 37).

The foregoing, sketchy as it may be, is a necessary introduction to an understanding of the position of affairs in these companies which gave rise to the present litigation.

This action is one in which Gray sues on divers claims, one of which is solely a personal claim, and the others of which are claims which, if successful, would accrue not only to the benefit of Gray but to all other shareholders in Yellowknife.

Two of the claims set out in the prayer of the plaintiff's statement of claim are now abandoned. They are as follows, and have been abandoned for the following reasons: The plaintiff's claim (a) is for delivery to him by the B.E.A.R. company of 364,733 shares of Yellowknife, as set out in para. 6 of the statement of claim. It became evident, after the litigation started, that a certificate for these shares claimed by the plaintiff had at all times been available to him, but that no inquiry or demand had been made therefor until these proceedings were well under way. The plaintiff's counsel at the opening of the trial acknowledged that delivery had now been made of the certificate and that this claim had been fully satisfied. It was quite apparent to me from the evidence that had the plaintiff sought it, he might have received the delivery of the certificate or certificates for the foregoing shares long before the issue of the writ herein.

In prayer (g) of the plaintiff's statement of claim he sought to make perpetual an interim injunction earlier granted, forbidding the amalgamation of the two defendant companies, and the sale or transfer of all or any of the assets or undertakings of Yellowknife to the defendant B.E.A.R., as proposed in a notice to the shareholders of Yellowknife, dated the 19th February 1944. It is apparent that owing to changed conditions during the litigation, the proposed plan for such amalgamation of the companies has now become undesirable and has been abandoned. This has been covered and agreed upon in an exchange of correspondence between the solicitors for the parties hereto, in which an undertaking was given that the proposed amalgamation or sale or winding-up of Yellowknife would be abandoned.

Mr. Pickup, at the opening of his argument, stated: "It is not necessary that the Court make any order as to the issue." He asked, however, that the formal judgment of the Court should contain the undertaking set out in the exchange of correspondence between counsel which has been filed herein. I am not in a position to make any disposition of this matter. Only in the event of complete agreement between counsel (as I understand there is) is it possible for the formal judgment of the Court to make reference to this undertaking.

With these claims so disposed of, there remain for determination herein three main claims made by the plaintiff, or the alternatives asked thereto. They are as follows:

1. The delivery to the plaintiff by B.E.A.R. of 300,000 shares of Yellowknife, or in the alternative either delivery to the plaintiff by B.E.A.R. of 500,000 shares of B.E.A.R. or damages for the retention and conversion of the same. See prayers (b) and (c) of the statement of claim.

It should be noted that the foregoing is purely a personal claim made by the plaintiff Gray, and if successful would not redound to the benefit of shareholders other than himself. It should also be noted, therefore, as stated by Mr. Munnoch, that this claim is not asserted as against Yellowknife and that Yellowknife necessarily offers no defence thereto.

2. A declaration that 300,000 shares of Giant, transferred to B.E.A.R. by Burwash in settlement of a debt of \$57,000 owing by Burwash to B.E.A.R., is void, and a direction that such shares be retransferred from B.E.A.R. to Yellowknife as the assignee of the assets of Burwash as being the property of the last named company or its assignee, or in the alternative a declaration as to the inadequacy of the consideration paid by B.E.A.R. for the said shares and an accounting by B.E.A.R. to Yellowknife therefor.

3. A declaration that the transfer of 350,000 shares of Giant from Yellowknife to B.E.A.R. is void and an order that such shares be retransferred by B.E.A.R. to Yellowknife, or in the alternative a declaration as to the inadequacy of the consideration paid by B.E.A.R. for the said shares and an accounting by B.E.A.R. to Yellowknife therefor.

The last two claims or their respective alternatives, if successful, would accrue to the benefit not only of Gray but of all shareholders of Yellowknife.

The first of the foregoing claims made by the plaintiff arises from a series of transactions in 1938 between Gray and one Wehrhan. Early in 1938, Gray found himself as the largest and controlling shareholder of B.E.A.R., but in a position where it was impossible for him to arrange the financing of the company's operations. The shares of B.E.A.R. were no longer listed on the Toronto Stock Exchange, and no market was existent for them. In this difficult financial plight, Gray entered into negotiations with Wehrhan, who was a mining promoter and salesman operating in Toronto and New York.

There is no controversy as to these transactions down to that of 12th August 1938. They were crystallized in three

written agreements filed as Exhibits 26, 31 and 37. The defendant B.E.A.R. was not a party to the two former.

The first named (Ex. 26) is an agreement dated 28th April 1938, between the plaintiff and a company known as "Chickasaw Company Limited", a private company used by Wehrhan for his trading purposes. By this, Gray gave option "A" for 300,000 shares of B.E.A.R., and option "B" for 500,000 shares of B.E.A.R., to Chickasaw. It was further provided that Gray should loan 85 per cent. of the proceeds of the sale of the shares under option "A" to B.E.A.R. at the option of B.E.A.R., and that such loan if made, together with all indebtedness of B.E.A.R. to Gray, should be repaid by the transfer by B.E.A.R. to Gray of shares of Yellowknife at the rate of 50 cents per share. B.E.A.R. was, however, to have the right to repurchase any such shares of Yellowknife so transferred at the price of 50 cents per share within two years after such transfer. I repeat that B.E.A.R. was not a party to this agreement. The agreement further provided for nomination and election to the boards of directors of B.E.A.R., Yellowknife and Burwash of persons who were the choice of Chickasaw, and the delivery to such new boards of all records of the three companies.

Pursuant to this last provision, Mr. Lester M. Keachie, a reputable solicitor practising in Toronto, and his firm associates, as nominees of Chickasaw, became directors of the companies, received the records and assumed the management of the companies.

In June and July 1938, as evidenced by Exhibits 27, 28 and 29, Gray made demand on Keachie for delivery of some 336,634 shares of Yellowknife under the terms of this agreement, for a debt of \$150,817.06 owing to him by B.E.A.R. and a further \$8,500 loan from the proceeds of some shares taken up under the option "A".

B.E.A.R. gave recognition to this arrangement as evidenced by a letter (Ex. 30) dated 21st July 1938, from B.E.A.R. to Gray and by him acknowledged.

The option agreement (Ex. 26) was assigned by Chickasaw to another company of Wehrhan's, *viz.*, Yukon Yellowknife Developments Limited. On the 22nd July 1938 a new agreement, Ex. 31, was executed by Gray and the Yukon company, varying the earlier arrangements, but no reference is necessary

to the varied terms which were further elaborated by an agreement between the same parties dated the 28th July 1938 (Ex. 33), which expressly states that the latter (Ex. 33) was executed by the parties for the purpose of expressing a verbal understanding arrived at prior to the execution of the agreement of 22nd July. Exhibit 33 expressly stipulates that neither party thereto shall at any time have any claim against B.E.A.R. by reason of the payment of moneys paid to B.E.A.R. as provided by the agreement.

As stated, B.E.A.R. was not a party to the foregoing agreements, but B.E.A.R. finally became a party to an agreement dated 28th July 1938, and filed as Ex. 37. This was also executed by Gray, Chickasaw and Yukon and it gives an excellent summation of the situation and agreements which prevailed. No evidence of the plaintiff at the trial permits him to derogate from the recitals and agreements supported by his signature to Ex. 37. This last agreement recites, *inter alia*:

"Whereas the Company [B.E.A.R.] was, in the month of April, 1938, in financial difficulties and owed substantial sums to various creditors which it was unable to pay.

"And whereas the Optionor [Gray] was at that time the largest shareholder and also the largest creditor of the Company and as such was desirous of reducing the liabilities of the Company and of putting funds in the treasury of the Company for the purpose of enabling the Company to carry on its operations and of increasing the value of the shares owned by the Optionor"

Then, after reciting the 28th April agreement, Ex. 37 continues with the following recitals, *viz.*:—

"And whereas all the parties hereto [*i.e.*, including B.E.A.R.] fully understood that the Optionor [Gray], in releasing the Company from any indebtedness to him for monies advanced was, save for a nominal value of one cent per share attached to the said shares of Yellowknife Gold Mines Limited, *donating* all such monies to the Company for the purpose of improving the financial position of the Company and increasing the value of his shares in the Company. [The italics are mine.]

"And whereas, for the purposes of setting forth the true nature of the transaction, the parties hereto have deemed it advisable to enter into this agreement."

The agreement then proceeds to state the terms, *viz.*, that the true value of Yellowknife shares was one cent per share, that the optionor (Gray) was donating the difference to the company, and proceeds further to state that "the essence of the whole transaction was a gift by the Optionor to the Company."

It should again be noted that this is the only agreement filed to which B.E.A.R. is a party—that in this Gray states that the true nature of the transaction so far as B.E.A.R. is concerned is that of a donation.

It was submitted that the foregoing agreement was entered into by the parties at the suggestion of the auditors, so as to lighten certain matters of taxation. Be this as it may, its true significance, in my opinion, is that it gives for the first time a statement to which both the plaintiff and the defendant B.E.A.R. are parties and introducing the idea of a donation by Gray to the company which would not only assist the company but also accrue to Gray's personal benefit as the largest shareholder.

This was the situation existent when the agreement of 12th August 1938 was recorded (*vide* Ex. 34 and attached documents).

It was abundantly clear from the evidence that prior to 12th August, Wehrhan was not being successful in marketing the B.E.A.R. stock "across the counter", and, to the knowledge of Gray, was trying to have the stock listed on the exchange. I find that listing was refused because the exchange authorities objected to the depletion of the B.E.A.R. treasury by the transfer of its holdings of Yellowknife stock to Gray in consideration of his financial advances to B.E.A.R. of cash from the proceeds of the sale of his personal holdings of B.E.A.R. stock.

With this impasse, Gray, in conference with Wehrhan, entered into the arrangement set out in Ex. 34 and attached documents. These documents are in the main addressed to Mr. Lester M. Keachie. I find that, as a fact known to Gray, Keachie had gone to Europe in the latter part of July and was not to return to Toronto for some weeks.

Gray made all the arrangements in Ex. 34 and annexed exhibits with Wehrhan and I am of the opinion that in addressing the documents to Mr. Keachie, Gray well understood that he was dealing, not directly with Keachie, but in his absence

with his law office—in this instance represented by Mr. Johnson. Bearing these facts and the earlier transactions in mind, it is only reasonable to conclude that Keachie was a mere stakeholder—holding the 500,000 shares in escrow for the purposes and on the terms set out in Ex. 34. Wehrhan testified that the agreement in Ex. 34 was a result of his advising Gray that only by an outright donation of the 500,000 shares of B.E.A.R. by Gray to B.E.A.R. could the listing of the stock on the exchange and the resulting financing of B.E.A.R. be made possible. That Gray was so making the donation subject to certain terms and conditions is evident from the documents signed by Gray.

Ex. 34-B authorized Keachie to hold the 500,000 shares as trustee for B.E.A.R., to be dealt with as directed by the board of directors of B.E.A.R., and it contains the following statement by Gray:

“the intention being that from this date forward I shall cease to have any title or interest in the said 500,000 shares and the same shall be vested in you as Trustee for Bear Exploration and Radium Limited as aforesaid.”

Exhibit 34-A is a formal transfer for valuable consideration by Gray of the 500,000 shares to Keachie as trustee for B.E.A.R.

Ex. 34 itself is the escrow authority and reads as follows:

“I am handing you in escrow the attached six documents to be delivered only when the 500,000 shares mentioned are sold by sale and purchase agreement for not less than \$150,000 net and not less than \$50,000 is paid in to you as part of said sale price for the benefit of B.E.A.R. company, and upon Yukon Yellowknife Developments Limited releasing me from all agreements between us now outstanding and upon B.E.A.R. releasing me from option to sell back any Yellowknife Gold Mines Limited stock and upon these requirements being fulfilled within twenty days from date hereof.”

The intention expressed in Ex. 34-B as above quoted was that Gray's title and interest ceased from 12th August, conditioned upon the requirements set out in Ex. 34 being fulfilled within 20 days from 12th August. If so, then B.E.A.R. became the *cestui que trust* of the shares and the proceeds thereof and the plaintiff necessarily fails in his claim in respect thereto.

Were the stipulations contained in Ex. 34 satisfied and within the 20 days?

I find without hesitation that all of the conditions were met. I can place no confidence in Gray's evidence at the trial that the sale in contemplation in Ex. 34 was one by Keachie himself to a group of New York people. The immediate actions of all those active in the transaction of 12th August were consistent with the donation of this stock by Gray—and wholly inconsistent with his present claim in respect thereto. Moreover, Gray's own statements and actions sustained my view in this regard.

On 2nd September 1938 Gray wrote a letter to Keachie, Ex. 44, in which he acknowledges the true and correct statement of the B.E.A.R. shares held by Keachie under the provisions of the agreement of 22nd July 1938, and the agreement of 12th August 1938. In this the 500,000 shares are shown as delivered to Keachie as trustee for B.E.A.R. Again, on 8th September 1938 (Ex. 44), Gray acknowledges that the only B.E.A.R. shares held by Keachie in Gray's name were some 25,000 shares on a Hershman option and 1,182 shares belonging to Gray himself. With Gray's close attention to and vital interest in the welfare of B.E.A.R. and the activities with respect thereto, I must conclude on the evidence also that he had knowledge of the representations contained in the company's application for listing of its stock on the Toronto stock exchange. As stated earlier, there was evidence which I accept that the exchange refused to list the B.E.A.R. stock under the arrangements existing with Gray prior to 12th August. The stock was listed on 7th September 1938, and the listing statement, Ex. 47, filed with the exchange, contains a paragraph no. 11 headed "Particulars of any issued shares held in trust for the Company or donated for treasury purposes", to which the answer was inserted—"500,000 issued shares have been donated to the Company and are underwritten." In para. 12 these 500,000 shares are shown as 200,000 sold and the balance underwritten by Yukon Yellowknife Development Company.

Moreover, it is not without great significance that in a corporation income tax return for B.E.A.R. as of the 31st December 1941 (Ex. 48) filed with the City of Toronto, to which an affidavit of verification is attached signed by Gray, there is no reference whatsoever to any liability to Gray—although one would have expected such a liability to be uppermost in his mind.

I am satisfied on the evidence that it was well known to Gray that the listing application was approved by the stock exchange on the basis that the shares were a donation to the company. The first time the contrary was suggested by Gray, so far as B.E.A.R. is concerned, was in the letter of 26th February 1944 (Ex. 16), in which Gray demanded the delivery to him of the 300,000 shares of Yellowknife in satisfaction of the proceeds of the sale of the 500,000 shares of B.E.A.R. sold for \$150,000. It is true that by correspondence from April to October 1939 (Ex. 40 a to f) Gray had made demands upon Mr. Keachie threatening action based on fraud against Keachie and others, but not against B.E.A.R. The writ herein was not issued until 10th March 1944. In the interval, Gray had once more been for a time in control of the defendant company and active therein as a director and officer. It is surely reasonable to expect that if his present claim were justified, then in the circumstances, both as a shareholder and as a director, Gray was under a duty to assert that claim in respect to these 500,000 shares of B.E.A.R., or the 300,000 shares of Yellowknife in the alternative, much earlier. Quite apart from what I find to be the facts of the case, and assuming that there had been in fact some understanding such as is now claimed by Gray, I am of the opinion that his conduct falls within the doctrine of estoppel by conduct and representation. The general principle of the doctrine of personal estoppel, as stated by Lord Denman C.J. in *Pickard v. Sears et al.* (1837), 6 Ad. & El. 469, 112 E.R. 179, is set out in Everest and Strode, *The Law of Estoppel*, 3rd ed. 1923, pp. 237-8, and is as follows:—

“Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.”

At p. 243 the author also states the further well-established principle:—

“Another recognized proposition seems to be that, if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of

facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts. And another proposition is, that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented."

Mr. Pickup's contention that the terms of the letter of 12th August constituted Keachie as the selling agent is not maintainable. Keachie was, in my opinion, purely in the position of a stakeholder, with directions to deliver the holdings upon the fulfilment of certain conditions. As I have intimated, those conditions were, in my opinion, fully met. As I understand Mr. Pickup's further contention that no sale of 500,000 shares of stock was effected within the terms of Ex. 34, namely, 500,000 shares at 30 cents per share, the practice clearly prevailing in the sale of mining stocks in large blocks is to the contrary. Evidence was given of a number of agreements well within Gray's knowledge, some even with Gray himself as purchaser, in which an option was granted for a block of stock to be taken up in repeated sections and at an ascending price. With this knowledge it ill becomes Gray to suggest now that the stock placed in escrow under the letter of 12th August to Keachie was to be sold at a uniform price of 30 cents per share. The practice of the market was to the contrary, and the language of Ex. 34, namely, "for not less than \$150,000 net" clearly contemplates the prevailing practice which I have stated.

With the view which I have thus expressed of this transaction, there can, in my opinion, be no question of damages for wrongful conversion of the 500,000 shares of B.E.A.R. Thus the plaintiff's claim in respect to the 500,000 shares fails entirely.

In his argument in support of his client's claim with respect to the 500,000 shares, Mr. Pickup summed up the situation in these words "I think everything turns upon whether or not the authority in Ex. 34 became effective." With this I agree, and I conclusively find on the evidence that all terms and conditions were fully fulfilled and therefore that the authority became effective. This is purely a matter of a finding of fact on the evidence.

Of the remaining two claims set up by the plaintiff, the first is that with respect to 300,000 shares of Giant issued to B.E.A.R. in 1937 upon the incorporation of Giant in satisfaction of a debt of \$57,916.88 owing by Burwash to B.E.A.R. for development work done by B.E.A.R. on the claims known as the "Rich" group owned by Burwash. The plaintiff claims the restoration of these shares by B.E.A.R. to Yellowknife, which in 1938 took over all the assets of Burwash when the latter was wound up. The agreement between Burwash and B.E.A.R. relating to this transaction is dated the 1st July 1937, and is filed herein as Ex. 45. This document is executed under the corporate seal of each of the companies by the plaintiff Gray as vice-president and Bourne as secretary respectively of each of the contracting companies. It should be recalled that this transaction is stated in Ex. 45 to have been as of 1st June 1936, when Gray was in active control of all the companies; that when Gray was required to turn over all records of the various companies to Keachie and his associates in April 1938, such records contained no minutes of directors' or shareholders' meetings of B.E.A.R., Yellowknife or Burwash for the year 1937. Only the minutes of the newly-incorporated Giant were available for 1937. No explanation was vouchsafed by Gray at any time for the absence of these minutes.

At the date of the agreement, Ex. 45, the Burwash account in the B.E.A.R. ledger showed a debit owing to B.E.A.R. of \$57,916.88. In this respect the agreement, Ex. 45, provided that "The Purchaser [B.E.A.R.] agrees that loans made to the Vendor Company [Burwash] shall be cancelled and the Purchaser agrees to pay all the debts of the Vendor."

Incidentally, it should be noted that this agreement (Ex. 45), to which, as stated, Gray was a signatory, provided in its final clause, as follows:—

"It is agreed that the validity of this Agreement shall not in any way be impaired by the fact that the Purchaser stands in any fiduciary relationship towards the Vendor."

The credit entry showing the receipt of the Giant shares by B.E.A.R. in satisfaction of the Burwash debt was not made until 1938 when, after Keachie took over the management of the companies, a firm of auditors attempted, and, I think, succeeded in creating order out of the confusion of records or lack of them resulting from Gray's management in 1937.

While the bookkeeping entries were so made in 1938 after Gray ceased to control the companies, the minutes of the meeting of the directors on 4th August 1937, Ex. 50, which are signed by Gray as president, record the actual allotment of the 300,000 shares to B.E.A.R. pursuant to the transaction.

This transaction seems to me to fall directly within the powers granted to B.E.A.R. in its letters patent quoted at the outset, *viz.*, to develop and manage mines of other companies or persons and to take as consideration for work done by contract or otherwise shares of any other company having similar objects to itself and to hold, sell or otherwise dispose of such shares.

The plaintiff attacks the transaction on the ground that the directors of the two companies were identical in personnel. I agree with the defendants that Gray enjoys no status to advance such claim.

At the time of the agreement, Ex. 45, Gray was a large shareholder in B.E.A.R., and as such was in the position to benefit by B.E.A.R.'s acquisition of Giant shares. Since then Gray has become a minority shareholder in B.E.A.R. and has increased his shareholdings in Yellowknife. It would now profit him to have the transaction voided. Not only might it be said that Gray was the author or architect of this transaction—but as late as April 1941 Gray was a signing director of the prospectus of Giant filed under the Ontario Companies Information Act 1928 (Ex. 46) in which item 10 contains the following statement, *viz.*:

“The consideration paid for the transfer of the mining claims to the Company was the issuing of 1,200,000 fully paid and non-assessable shares of the Company. Of these shares Bear Exploration and Radium Limited received 300,000 shares and Burwash”, etc.

I find it difficult to approve of the reversal of Gray's position. He cannot approbate when conditions benefit him and reprobate with the hope of again gaining benefits to himself in changed conditions.

The principles disqualifying a minority shareholder from bringing action in the circumstances are discussed and well-established in *Fullerton et al. v. Crawford et al.*, 59 S.C.R. 314, 50 D.L.R. 457, [1919] 3 W.W.R. 843, and in *Henderson v. Strang*

et al., 60 S.C.R. 201, 54 D.L.R. 674, [1920] 1 W.W.R. 982. In the latter case it was held that a minority shareholder cannot maintain an action for a declaration that past transactions of the company are illegal and void against the will of the majority after he has acquiesced in and benefited from the operation of the company and the act or acts alleged to have been *ultra vires*. See also *Towers v. African Tug Company*, [1904] 1 Ch. 558 and *Shiesel v. Kirsch*, 66 O.L.R. 174, [1931] 1 D.L.R. 460, affirmed [1931] O.R. 41, [1931] 2 D.L.R. 791.

Is the transaction void as contended by the plaintiff because of the lack of independence and because of the identity of the two boards of directors of the two companies? Was there a fiduciary relationship which vitiates any contract between two companies with identical directors *ipso facto* and in the absence of any fraud or misrepresentation?

The established common law principle as to the relation of directors to a body corporate was laid down by Lord Cranworth L.C. in *Aberdeen Railway Company v. Blaikie, Brothers* (1854), 1 Macq. 461 at 471 thus:

"A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the cestui que trust, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person,—they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted."

This statement of law is quoted with approval in *Transvaal Lands Company v. New Belgium (Transvaal) Land and Develop-*

ment Company, [1914] 2 Ch. 488, which case is in turn authority for the following proposition found at p. 503 (*per* Swinfen Eady L.J.):

“Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagements with the company of which he is a director, he is in our opinion within this rule. He has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director. It is immaterial whether this conflicting interest belongs to him beneficially or as trustee for others.”

But in the present case, the general rule so laid down, and from which I do not deviate, must be applied in the light of the powers and by-laws of the companies in question.

It is clear, I think, that the common law rule so stated in the *Transvaal* case is subject to any special provisions in the articles of association in England. This is expressed by Swinfen Eady L.J. at p. 504:

“The case of *Costa Rica Railway Company, Limited v. Forwood*, [1900] 1 Ch. 756, affirmed [1901] 1 Ch. 746, shews the extent to which a director may be protected by articles of this kind, but the same case emphasized the general rule.”

Also it is stated in *North-West Transportation Company, Limited et al. v. Beatty* (1887), 12 App. Cas. 589 at 601, C.R. [9] A.C. 311:

“But the constitution of the company enabled the defendant J. H. Beatty to acquire this voting power.”

The by-laws of the two companies to this transaction were identical in by-laws 54 and 55—both of which are hereinbefore recited in full. I again extract from by-law 54 the phrases here applicable:

“no contract or other transaction between this Company . . . and any other . . . corporation shall be affected by the fact that a Director or Directors of this Company are interested . . . in such other . . . corporation or are Directors thereof. All such dealings are subject also to the statutory provisions governing the same.”

As was stated by Swinfen Eady J. in *Percival v. Wright*, [1902] 2 Ch. 421:

"The true rule is that a shareholder is fixed with knowledge of all the directors' powers". With equal force must it be said that shareholders must be assumed to have knowledge of the provision of the by-laws of their company, and to be bound by their own constitution—a *fortiori* must this be so when the complaining shareholder has been one of the chief designers and artificers of this structure of companies with similar purposes and interwoven management.

In *Waschysyn v. Kildonan Ice & Fuel Company et al.*, [1937] 2 D.L.R. 653, 45 Man. R. 96, [1937] 1 W.W.R. 572, a decision of the Court of Appeal of Manitoba, it was held that (headnote, D.L.R.):

"A shareholder who participated in an arrangement made at a general meeting of a company under a resolution unanimously enacted after being fully explained to and understood by the shareholders, held estopped from later impeaching the transaction."

This same principle was expressed in *Gregory v. Patchett* (1864), 33 Beav. 595, 55 E.R. 499, in which it was held that:

"Shareholders in a company cannot lie by, sanctioning, or by their silence at least acquiescing in, an arrangement which is *ultra vires* of the company, watching the results: and if it be favourable and profitable to themselves, to abide by it and insist on its validity; but if it prove unfavourable and disastrous, then to institute proceedings to set it aside. Therefore, where shareholders complained of acts *ultra vires*, which they had acquiesced in for six years, relief was refused."

The same idea was expressed similarly in *Hood et al. v. Caldwell et al.*, [1923] S.C.R. 488, [1923] 2 D.L.R. 1026. This was an appeal from a decision of the Appellate Division of the Supreme Court of Ontario, affirming the judgment at trial in favour of the defendants. The appeal was dismissed (although Duff and Brodeur JJ. dissented) on the grounds for the affirmation of the judgment by the majority of the Court which are stated by the Chief Justice at p. 489 as follows:

"On the ground solely that the plaintiffs in this case had by their laches and acquiescence debarred themselves from the relief prayed for in this action, as found by the trial judge and confirmed by a majority of the Court of Appeal, I am of the opinion that this appeal should be dismissed".

And also as stated by Anglin J. at p. 493:

"On both branches of the case the learned trial judge found the plaintiffs debarred from relief by laches and acquiescence, and in that conclusion, affirmed by a majority of the learned Appellate judges, I agree, and would consequently dismiss this appeal with costs."

See also *Classic Hosiery Co. Limited v. Fillis* (1920), 18 O.W.N. 17, in which it was held that "the acquiescing shareholders cannot afterwards complain of an irregularity to which they consented."

Under the Ontario law, the equivalent to the articles of association in England are, subject to the powers contained in the letters patent and the Companies Act, the general by-laws of the company: *vide The Theatre Amusement Company et al. v. Stone* (1914), 50 S.C.R. 32, 16 D.L.R. 855, 6 W.W.R. 1438. I have already dealt with the provision of the company by-law with respect to contracts with companies having common directors. The relevant and governing section of The Companies Act, R.S.O. 1937, c. 251, is s. 93.

All counsel agree that they have been unable to find any judicial decision on the interpretation of s. 93. But it was discussed by Ferguson J.A., in *Roxborough Gardens of Hamilton Limited v. Davis* (1920), 46 O.L.R. 615 at 631, 52 D.L.R. 572, where he states:

"There is nothing in the by-laws of the plaintiff company providing for dealings between the company and its directors, but sec. 93 of the Ontario Companies Act, R.S.O. 1914, ch. 178, makes provision for such dealings, and that section allows more latitude than most of the provisions found in the articles by which the English companies are governed. Section 93 declares that a director in one company shall not be deemed to be interested in a contract made with another company simply because he is a shareholder in such other company; and, had the transaction here attacked been a sale by the directors of the plaintiff company to the defendant company, that proviso in sec. 93 of the Ontario Companies Act might have protected the transaction by relieving these individual defendants from disclosing to the plaintiff company their interest. But this sale was not a sale by the directors. It was a sale by two specially authorised officers. Mr. Laird took no part in it and gave it

no consideration; the exception in the general law provided for by the Ontario Companies Act does not cover that situation; and, if I be right in my view of the facts, this sale was not a sale by the plaintiff company to the defendant company, but was a sale to a syndicate of which the individual defendants were members, and the Ontario Companies Act does not protect that situation unless there has been a disclosure."

There are certain dicta herein which I consider helpful to me in the present case, *viz.*, firstly: "there is nothing in the by-laws . . . ", the significant inference being that had the by-laws made provision for dealings between the company and its directors, then the transaction under review might have received approbation. As I have noted above, the by-laws of both defendant companies in specific terms protect contracts of the present nature. Secondly: that "sec. 93 . . . allows more latitude than most of the provisions found in the articles by which the English companies are governed."

The present situation falls well within the exception expressed in s. 93(2), *viz.*, "but no director shall be deemed to be in any way interested in any contract or arrangement, nor shall he be disqualified from voting or be held liable to account to the company by reason of his holding shares in any other company with which a contract or arrangement is made or contemplated."

A director can only be such by reason of his being a shareholder in the company. It would therefore be illogical to extend the protection of the exception to a shareholder but not to a shareholder who has become a director.

But there is another feature which appears to run all through the facts of those cases in which directors have been held liable to account—while the general principle stands—that any person in a fiduciary capacity is not allowed to make a profit out of property in regard to which the fiduciary relation exists. In all of the cases which were cited by counsel and which I have read, the fact has been established, to the satisfaction of the Court, that there had been a secret profit flowing to the director personally; that there had been some fraud and dishonesty, and that without that element, an action against the director failed. This is not an action against directors—but surely the presence of some degree of fraud or dishonesty is as essential

where the action is against the company, and there is here not the slightest evidence even suggestive of such.

It has been held that in order that a minority shareholder may sue, he must show that the acts complained of are either fraudulent or *ultra vires*: *vide Burland et al. v. Earle et al.*, [1902] A.C. 83, C.R. [12] A.C. 344; *Bennett v. Havelock Electric Light and Power Co.* (1910), 21 O.L.R. 120; see 46 S.C.R. 640, 8 D.L.R. 954, 23 O.W.R. 309. That this prevails is also supported by the more recent English decision in *Regal (Hastings) Limited v. Gulliver et al.*, [1942] 1 All E.R. 378.

The transaction in connection with the 350,000 shares of Giant transferred or sold by Yellowknife to B.E.A.R. in 1943 is challenged by the plaintiff on various grounds: firstly, that the Board of Directors of B.E.A.R. and Yellowknife were identical in personnel. This, I have already dealt with in connection with the 300,000 share transaction.

The plaintiff further contends that the transfer of the 350,000 shares of Giant from Yellowknife to B.E.A.R. was a distribution of assets of Yellowknife to some shareholders of Yellowknife only and was therefore unjustifiable and *ultra vires*. There is not, in my opinion, a tittle of evidence which supports such a contention. A development debt of \$53,037.28 was properly owing to B.E.A.R. by Yellowknife for dealings properly within the powers granted by the charters of each company. Yellowknife, as the assignee of Burwash, was the holder of shares of Giant with power to sell or otherwise dispose of them. I accept the evidence of the witness Mr. Webster and others, that the sole and only purpose prompting the transaction now challenged was to liquidate inter-company debts in contemplation of a merger of the two companies. Evidence was adduced as to contemporaneous sales of Giant shares. In comparison with the prices prevailing in such other sales, the relative value of the Giant stock moving in this liquidation of the debt owing to B.E.A.R. was fair and reasonable. I can find nothing in the evidence to suggest that the transfer of the 350,000 shares of Giant was because of any ulterior motive to benefit the shareholders of B.E.A.R., the directors of which are alleged to have had some inner knowledge of an anticipated rise in the market value of Giant shares. It is true that shortly after the transaction there was a phenomenal rise in the price of Giant and also

in B.E.A.R. It was asserted by the plaintiff that the reports of two geologists, Hershman and Ridland, with respect to Giant property were before the directors, who were substantial shareholders in B.E.A.R., but with only nominal or qualifying shares in Yellowknife. There was no evidence that the reports forecast any rich development or were the foundation for the soaring of the market prices. On the contrary, Dr. Hershman, who was the author of one report, held an option on 25,000 shares which he did not exercise. I also accept the evidence of Mr. Webster and Mr. Swanson that the geological reports in question had no bearing on the transaction.

A further ground for assailing this transaction is a technical one. Gray asserts, and with some possible justification, that by-law no. 67 of Yellowknife, increasing the board from three to five directors, was invalid and that hence Yellowknife had no board of directors capable of transacting the business of the company. This by-law no. 67 was passed by the board of directors of Yellowknife at a meeting on 21st April 1934, and is duly recorded in Ex. 2 at pages 37 and 45. In fact there is an entry immediately following the minutes of the board of directors purporting to record that the by-law was passed unanimously by the shareholders the same month if not the same day.

There is no question but that Gray was the solicitor of the company at the time, and also took his place as a director on the board by election at the same meeting at which by-law 67 was passed. However in 1938 when the control and management of the various companies passed into the hands of Mr. Keachie and his associates it was noted that no shareholders' general meeting had approved of by-law 67 amongst other things and that there had been no compliance with the provisions of s. 90 of the Ontario Companies Act.

Mr. Johnson, a solicitor of Mr. Keachie's law firm, proceeded to try to remedy the earlier errors and omissions of Gray as solicitor in respect of by-law 67. A general meeting of the shareholders was duly called and held on the 23rd July 1938, when a resolution specifically approving of by-law 67 was passed. The by-law was also filed with the Provincial Secretary and it was published in the Ontario Gazette.

Thus on the face of it all the requirements of s. 90 were fulfilled. But, as so often happens, in trying to remedy an error,

a statutory requirement was not strictly complied with, *viz.*, the notice calling the meeting (which is recorded on p. 136 of the minute book filed as an exhibit) failed to specify that the shareholders would be called upon to ratify the by-law increasing the board from three to five. The notice did read "To ratify the acts of the directors and officers". The resolution recorded as passed at the general meeting read thus:

"That all the acts and deeds of the directors of the company from the date of incorporation thereof to the date of this meeting and including specifically all by-laws and resolutions passed by the directors and all agreements entered into by the directors on behalf of the company be and the same are hereby approved, ratified, confirmed and adopted."

In support of his contention, the plaintiff's counsel cited with reliance *Re Carpenter Limited; Hamilton's Case* (1916), 35 O.L.R. 626 at 639, 29 D.L.R. 683. But this judgment was more aptly reviewed by Davis J.A. in *Re W. N. McEachren & Sons, Ltd.; McGibbon v. The Imperial Trust Co.*, [1933] O.R. 349 at 360, [1933] 2 D.L.R. 558, 14 C.B.R. 410, thus:

"Dealing, then, with the first contention taken or advanced by the appellant's counsel, that there were not validly elected directors of the company at the time of the making of the agreement, this contention rests upon the fact that the letters patent provided for a directorate of three members and that the company on February 21st, 1923, purported to increase the number to five at a special general meeting of the shareholders. There was nothing to show that the increase of the number of directors had been made in accordance with the provisions of the statute, now secs. 92(3) and 147, R.S.O. 1927, ch. 218. It is argued that an invalid election of directors dislodges those who were the directors up to that time, and reliance was put upon *The Garden Gully United Quartz Mining Company v. McLister* (1875), 1 App. Cas. 39, and *Re Carpenter Limited, supra*, but sec. 91 of our Act provides that directors shall continue in office until their successors are duly elected. The former case dealt with a declaration of forfeiture of shares by an invalid number of directors, and the latter case dealt with the validity of an allotment of shares. These [are] cases dealing with the validity of an allotment of shares. These cases dealing with the protection of shareholders as between themselves and the

company do not apply to business transactions between the company and outsiders. In my view, a company cannot escape liability upon an agreement executed under its common seal with an outsider on the ground that its directors had not been regularly elected."

I am of the opinion that the matter of the form of notice, or lack of it, to the shareholders was a matter of internal arrangement only, and should not militate against outsiders dealing with the company. Here, in so far as the public were concerned, all the requirements of the statute were met.

The well-known rule established in *The Royal British Bank v. Turquand* (1856), 6 E. & B. 327, 119 E.R. 886, is applicable here. Palmer's Company Precedents, 15th ed. 1938, pp. 70-1, quotes this rule as follows:

"This rule is that where a company is regulated by an Act of Parliament, general or special, or by a deed of settlement or memorandum and articles registered in some public office, persons dealing with the company are bound to read the Act and registered documents, and to see that the proposed dealing is not inconsistent therewith; but they are not bound to do more; *they need not inquire into the regularity of the internal proceedings* what Lord Hatherley called 'the indoor management.' They are entitled to assume that all is being done regularly . . .

"This rule is based on the principle of convenience, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed." And again at p. 71 the learned author quotes Lord Halsbury in *County of Gloucester Bank v. Rudry, Merthyr Steam and House Coal Colliery Company*, [1895] 1 Ch. 629 at 633:

" 'All the public documents,' said Lord Halsbury, 'with which an outside person would be acquainted in dealing with the company would only show this, that by some regulations of their own—what Lord Hatherley described as their indoor management—they were capable, if they had thought right, of making any quorum they pleased; and an outside person knowing that, and not knowing the internal regulation, when he found a document, sealed with the common seal of the company, and attested and signed by two of the directors and the secretary, was en-

titled to assume that that was the mode in which the company was authorized to execute an instrument of that description.' ”

At p. 72, the author says:

“So, also, a person dealing with a company is entitled to assume that the directors who carry on its business are directors *de jure*. It matters not to him that they have not been duly appointed—that is part of the indoor management.”

The board of directors in these circumstances were *de facto* directors: *vide* also *Foss v. Harbottle* (1843), 2 Hare, 461, 67 E.R. 189; *Mahony v. East Holyford Mining Company* (1875), L.R. 7 H.L. 869.

But it must be remembered that Gray personally functioned as a director of the company under the by-law, 67, which he now attacks as to its validity.

It has been well established, and properly so, as stated in *Palmer, op. cit.*, at p. 700, that:

“A director who takes part in irregular proceedings may be estopped from setting up the irregularity. *Faure &c. Co. v. Phillipart*, 58 L.T. 527; *York Tramways Co. v. Willows*, 8 Q.B.D. 685.”

Nor must it be forgotten that, so far as concerns the plaintiff's right now to assert this claim, he was a practising barrister and solicitor, and as such was the solicitor for the company. The view of the courts has been consistent, and was expressed in *Bulkley v. Wilford* (1834), 2 Cl. & Fin. 102 at 183, 6 E.R. 1094:

“ . . . there is an established principle in the Courts of Equity that no professional man can take advantage of his ignorance, of his negligence, much less of his fraud. If there were not such a principle recognized by Courts of Equity, they would ill deserve that name.”

In earlier discussing the plaintiff's claim to the 300,000 shares, I have expressed my opinion as to the effect of his acquiescence and approbation on his status to bring the action.

On the various grounds which I have discussed, I am of the opinion that the plaintiff must fail on this third claim.

This is not, I think, an instance where the Court should allow the substitution of some other shareholder in the place of Gray, as plaintiff, as requested by Mr. Pickup. Such a substitution at

this late stage in this litigation, and in the singular circumstances here present, cannot be supported in equity.

The plaintiff's action is dismissed, with costs.

Action dismissed with costs.

Solicitors for the plaintiff: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.

Solicitors for the defendant B.E.A.R.: Fennell, Porter and Davis, Toronto.

Solicitors for the defendant Yellowknife: Blake, Anglin, Osler & Cassels, Toronto.

[COURT OF APPEAL.]

Tavener v. The Village of Port Stanley et al.

Municipal Corporations—Powers—Invalidity of By-law granting Permission to Lay Pipe-line for Oil or Gasoline along Street in Municipality—The Municipal Act, R.S.O. 1937, c. 266, ss. 268, 303, 405(16), (46), (47), (60), 454(1), 507(3)—The Municipal Franchises Act, R.S.O. 1937, c. 277, ss. 3(1), 6(b).

A municipal council has no power to pass a by-law giving permission to a company or individual to construct pipe-lines for conveying oil and gasoline along or under the streets of the municipality. No such power is expressly given by The Municipal Act or The Municipal Franchises Act, nor can it be taken to follow by necessary implication from any of the provisions of those Acts.

AN APPEAL by the defendant McManus Petroleums Limited from the order of Mackay J., [1945] O.W.N. 511, quashing a by-law of the defendant municipality.

11th and 12th September, 1945. The appeal was heard by HENDERSON, LAIDLAW and MCRUER JJ.A.

J. R. Cartwright, K.C., for McManus Petroleums Limited, appellant: The trial judge should not have held that the consent of the electors was required before the enactment of this by-law. There is express statutory authority for its passing in s. 405(16) of The Municipal Act, R.S.O. 1937, c. 266. I refer also to s. 454 of The Municipal Act, vesting the soil and freehold of highways in the corporation, and to ss. 267 and 268, being the general sections as to the powers of municipalities. "Transporting" gasoline includes moving it in a pipe-line: *Columbia Conduit Company v. Commonwealth* (1879), 90 Pa. 307; *American and English Encyclopedia of Law*, 2nd ed. 1904, vol. 28, p. 452; *Re*

Hamilton Powder Co. and Township of Gloucester (1909), 13 O.W.R. 661 at 662.

The laying of a pipe-line across or along a street in a municipality is a natural and normal thing in these days. Gasoline is a dangerous thing, and much safer underground. The power to authorize the laying of a pipe-line must exist somewhere, and unless it can be shown that it is elsewhere, the only logical place for it to be lodged is in the municipality, which now has not only jurisdiction over the highways, and a duty to keep them in repair, but the actual ownership of the soil. There is no statutory enactment negating this power, and it is recognized by implication in s. 6(b) of The Municipal Franchises Act, R.S.O. 1937, c. 277. It is clear that the gasoline to be transmitted through the pipes here in question was not intended for sale or use in the municipality. Gasoline is included in the word "oil", as used in this subsection: see Words and Phrases, perm. ed., vol. 18, p. 94.

Upon the material before the trial judge he should have held that the by-law was validly passed, and in any case he should have refused the motion to quash it: *The Township of Westminster and The Town of Parkhill v. The County of Middlesex*, [1945] O.W.N. 91 at 92, [1945] 1 D.L.R. 349; *In re Richardson and Toronto Police Commissioners* (1876), 38 U.C.Q.B. 621; *Cartwright v. The Town of Napanee* (1905), 11 O.L.R. 69, reversed 8 O.W.R. 65. It is always discretionary with the Court to quash or refuse to quash a by-law, and the Court will refuse to exercise its discretion in favour of quashing where there has been unexplained delay in attacking it. Here, the appellant has gone to an expense of some \$30,000 since the passing of the by-law, and before the launching of this attack.

We rely further upon *Re Hamilton Powder Co. and Township of Gloucester* (1909), 13 O.W.R. 661; *Kuchma v. The Rural Municipality of Tache*, [1945] S.C.R. 234, [1945] 2 D.L.R. 13; *The Metropolitan Stores Limited v. The City of Hamilton*, [1945] O.R. 590.

G. W. Mason, K.C. (G. L. Mitchell, with him), for the applicant, respondent: Section 3 of The Municipal Franchises Act, R.S.O. 1937, c. 277, prohibits municipal corporations from granting any right to use or occupy any of the highways of the municipality unless or until the by-law with respect thereto has been

assented to by the municipal electors. If, as contended by the appellant, s. 6(b) of this Act applies, and makes s. 3 inapplicable to the by-law here in question, then reference would still have to be made to The Municipal Act for authority to pass such a by-law, and no such authority is given by that Act. In any event, s. 6(b) is not applicable, because it contemplates transmission to a point beyond the limits of the municipality, and not to storage tanks within those limits, and, further, it does not refer to the transmission of gasoline, but only to that of oil. The terms are not synonymous, and "oil" does not include gasoline.

Section 405(16) of The Municipal Act refers only to by-laws as to the keeping, storing and transporting of gasoline, and cannot authorize permission to lay pipe-lines under a highway. There are provisions for permitting the laying of pipes under highways, in subss. 46, 47 and 60 of s. 405, but pipe-lines for the transmission of oil or gasoline are not included in those subsections.

Section 268 of The Municipal Act cannot apply here, and does not contemplate the granting of a franchise affecting the highways. As to the construction of s. 268, see *Re Morrison and The City of Kingston*, [1938] O.R. 21 at 26, [1937] 4 D.L.R. 740, 69 C.C.C. 251; *Re Joel and The City of Toronto*, [1934] O.W.N. 626; *Code v. Jones and Town of Perth* (1923), 54 O.L.R. 425 at 426.

This by-law subserved private rather than public interests: *Re Howard and City of Toronto*; *Re Sweet and City of Toronto*, 61 O.L.R. 563, [1928] 1 D.L.R. 952; *Hurst v. Township of Mersea*, [1931] O.R. 290, [1931] 3 D.L.R. 355; *United Buildings Corporation, Limited v. The City of Vancouver*, [1915] A.C. 345, 6 W.W.R. 1335, 28 W.L.R. 787, 19 D.L.R. 97.

E. S. Graham, for the Village of Port Stanley, associated himself with the argument for the respondent.

J. R. Cartwright, K.C., in reply: This by-law had beneficial results, in the employment of additional men, and the increased assessment, sufficient to induce the Court, in the exercise of its discretion, to refuse to quash it: *The Metropolitan Stores Limited v. The City of Hamilton*, *supra*. A very heavy onus rests upon persons attacking a by-law: *Gilmore v. Township of Westminster*, 64 O.L.R. 344 at 347, [1929] 4 D.L.R. 1. The present respondent was heard at length by the council: *Kuchma*

v. The Rural Municipality of Tache, supra. The good faith of the council cannot be questioned. [LAIDLAW J.A.: Did not the council pass this by-law after their solicitor had advised them that they had no power to do so?] The solicitor was of opinion that there was no specific authority to do this, but there is general authority. Section 3 of The Municipal Franchises Act should be read disjunctively: *Re Joel and The City of Toronto, supra.*

Cur. adv. vult.

3rd October 1945. The judgment of the Court was delivered by

LAIDLAW J.A.:—This is an appeal by McManus Petroleums Limited, one of the defendants, from a judgment of Mackay J., dated 28th May 1945, whereby he quashed by-law no. 899 of the municipality of the Village of Port Stanley, passed on the 4th day of November 1944.

The by-law purports to authorize and instruct the reeve and clerk, on behalf of the municipal corporation, to execute, seal with the corporate seal, and deliver an agreement set forth in a schedule to the by-law and stated to be made a part thereof. The agreement recites that McManus Petroleums Limited (therein referred to as “the Company”) is engaged in the business of selling and distributing gasoline and oil; that it has requested permission from the council of the municipal corporation to lay certain pipes under and along certain of the highways of the corporation for transmission of gasoline or oil from the company’s premises at the waterfront to proposed storage tanks to be located at another place in the municipality; that the corporation has granted the company permission to lay the said pipes, subject to certain terms and conditions. I quote from the agreement in part as follows:

“Permission-conditional.

“2. The Company requests from the Corporation permission to construct two 8 inch steel pipe lines under and along Main and Colborne Sts., in the Village of Port Stanley . . . , and the Corporation so far as it has authority so to do hereby grants permission to the Company to construct the proposed pipe lines under and along the said streets . . . subject to the following terms and conditions . . .”

By an interpretation clause in the agreement the word "construction" shall mean and include "the locating, relocating, construction, reconstruction, laying, making, placing and installing of pipes for the transmission of gasoline or oil or any part or parts thereof or anything in connection therewith".

The nature and purpose of the agreement is to be first considered. Under its provisions the appellant acquires an interest in certain highways. It obtains a right to transport its wares in an exclusive channel under such highways. It is given a licence to use part of the highways for its own traffic. It may relocate and reconstruct its pipes thereunder during the term of the agreement if it so desires. While the right is exercisable only as to a portion of the highway "under and along the said streets", it is nevertheless an assignment by the municipal corporation of part of its interest in the highway to the appellant to have and to hold for itself, its successors and assigns only. The municipality thereby lessens its interest in the highway by the alienation of part of its rights therein.

The purpose of the agreement is obviously to enable the company better to transport its products from one place in the municipality to another.

The powers possessed by a municipality are not universal. They must be found in the express language used in The Municipal Act, R.S.O. 1937, c. 266, or by implication therefrom. I am impressed at once with the thought that if the Legislature had intended to give to municipalities a power of the kind and nature sought to be exercised in this instance, there would be found language in the legislation clearly to express such an intention. Thus in s. 507(3) of the statute it is plainly and expressly provided that by-laws may be passed by the council of every municipality "for permitting the owners of land to make, maintain and use areas under and openings to them in the highways . . . and for permitting the owners of land abutting on one side of a highway to construct, maintain and use a bridge or other structure over, across or under the highway . . . and for permitting the owners of land to maintain and use signs and other advertising devices which project over the sidewalks" Likewise s. 405(46) expressly provides "For regulating and, subject to *The Municipal Franchises Act*, . . . permitting any person supplying electricity for light, heat or power, to lay down pipes or conduits for enclosing wires for the transmission of electricity under

any highway" Section 405(47) provides: "Subject to *The Power Commission Act* for constructing or laying down pipes or conduits . . . under . . . any highway."

Again, s. 405(60) expressly empowers the councils of local municipalities to pass by-laws "For authorizing any person supplying steam for heat or power to lay down pipes or conduits . . . under the highways."

The sections of the Act referred to and quoted above illustrate and emphasize the use of explicit language in the legislation to empower councils of municipalities to pass by-laws of the nature and kind in question. But the appellant does not contend that the statute expressly sets forth the power. It is said that "the laying of a pipe line across or along a street in a municipality is a natural and normal thing in these days and that it is to be assumed that the power to authorize it exists somewhere". Counsel relies on, and first referred in argument to, s. 405(16). That provision empowers councils of local municipalities to pass by-laws, "For regulating the keeping, storing and transporting of, . . . petroleum, gasoline or naphtha" and other designated classes of things. For the purpose of deciding this case only I can accept the argument that the appellant by the use of its pipe-lines can be properly said to be transporting gasoline or oil; but the word "regulating" as used in the statute does not mean or include "authorizing". Where it was intended that councils should possess the power to regulate and also to authorize, language is used to express that intention plainly; see for instance s. 405(46), in which the language in part is "For regulating and . . . for authorizing . . . or permitting." The power to permit any person to lay down pipes under the highways is conferred upon councils in express language, and is not left by the enactment to implication. See also s. 405(60), from which the distinction in the use of the words "regulating" and "authorizing" appears.

In my opinion s. 405(16) cannot be extended so as to confer upon councils of local municipalities the power to permit the use of a portion of the highway for the purpose of transporting the substances enumerated, in the manner provided in the agreement in question.

Counsel relies on s. 268 of the statute, whereby "Every council may pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the

municipality in matters not specifically provided for by this Act, as may be deemed expedient and are not contrary to law". It has been clearly stated that the powers exercisable by a council under this provision of the Act are limited in scope and "Very few subjects falling within the ambit of local government are left to the general provisions" of this section: *per* Middleton J.A. in *Re Morrison and The City of Kingston*, [1938] O.R. 21 at 26, [1937] 4 D.L.R. 740, 69 C.C.C. 251. By no possible interpretation can the by-law in question fall within the power of the council to pass by-laws "for the health, safety, morality, and welfare of the inhabitants of the municipality".

It is argued that the council had power to pass the by-law by reason of the fact that the ownership of the soil of the highways is vested in the municipality under s. 454(1) of the statute. I cannot accept that argument. If it were to be given effect it would mean that the use of express language, as used in a great many places in the statute to confer powers on the councils of local municipalities, was unnecessary; for instance, the powers referred to and as contained in s. 405(46), (47), (60) and s. 507(3), *supra*. The vesting of the soil and freehold of a highway in a municipality does not thereby empower the municipality to grant permission to a person to use part of the highway for his own purpose in the manner and to the extent contemplated in this instance. The power sought to be exercised by the appellant cannot be found in this section of the Act.

Counsel for the respondent argued that the by-law was *ultra vires* and illegal because there was no power in the council of the municipal corporation to enact it; that under the provisions of The Municipal Franchises Act, R.S.O. 1937, c. 277, s. 3(1), the municipal corporation was prohibited from granting the appellant the rights purported to be given to it "unless or until a by-law setting forth the terms and conditions upon which and the period for which such right is to be granted has been assented to by the municipal electors . . ."; that the by-law had not been assented to by the municipal electors; that the by-law "was tantamount to a lease of the highway or part of the highway and no notice of the proposed by-law was published or posted"; that it subserved the interests of the appellant as against the interests of the residents.

I have endeavoured to make it plain that in my opinion the power of the council of the municipal corporation to pass the

by-law in question is not contained in The Municipal Act and does not exist. But, even if the council possessed such power it is only exercisable in the particular circumstances in accordance with the provisions of s. 3 of The Municipal Franchises Act, *supra*. That section, as applicable to the facts of this case, must be interpreted and read in the manner as stated by Rose C.J. H.C. in *Re Joel and The City of Toronto*, [1934] O.W.N. 626. The words in the section "the right to use or occupy any of the highways" are not qualified by what follows. Rose C.J.H.C., at p. 628, says: "Grammatically such a construction is impossible, and the statute must be treated as meaning what it says and all that it says." Admittedly the by-law in question was not assented to by the municipal electors and therefore on this ground alone it is wholly *ultra vires* and illegal.

Counsel for the appellant relies on the provisions contained in s. 6(b) of The Municipal Franchises Act, and argues that the only reasonable interpretation to be given thereto is that it must be assumed therefrom that councils of municipal corporations possess the power of "conferring the right to construct, use and operate works required for the transmission of oil, gas or water not intended for sale or use in the municipality." He urges that pipe-lines for the transmission of gasoline or oil are "works required for the transmission of oil, gas or water", within the meaning of the words used in s. 6(b). I think that the words "gasoline or oil" as used in the agreement purported to be made between the parties must be read in their usual and ordinary meaning. It may be that the word "oil" can mean and include the substance "gasoline" in different circumstances or for other purposes. In my opinion, however, that word as used in the statute cannot be so interpreted. The word "gasoline" is well understood, and if the legislators had intended to include that substance in the enactment, the word would have been included; see for instance the use of the word in s. 405(16) of The Municipal Act. In any event it is my view that no power to pass a by-law to permit the construction of pipes to transport gasoline or oil under highways can be implied from the provisions of s. 6(b), *supra*. The sole effect of the provision is to except the conferring of the right therein described from the operation of s. 3. It merely makes the prohibition contained in s. 3(1) inapplicable. It does not create by implication any added power which the municipal corporation did not otherwise possess.

It was finally urged by counsel on behalf of the appellant that the Court ought to exercise a discretion and decline to quash the by-law by reason of the delay on the part of the applicant in making application to the Court for such an order. I think there was no undue delay on the part of the applicant. I do not review the facts and dates, but the circumstances show that the application to the Court was made with all reasonable diligence. It may be observed that the statute expressly provides that an application to quash a by-law which requires the assent of the electors, which this one did in any event, may be made at any time: The Municipal Act, s. 303.

My conclusion is that the by-law in question is wholly *ultra vires* and illegal and ought to be quashed. The judgment of the learned judge in the court below is right, and the appeal should be dismissed. The respondent is entitled to the costs of this appeal, to be paid by the appellant McManus Petroleums Limited, but no further order as to costs ought to be made.

Appeal dismissed with costs.

Solicitors for the applicant, respondent: Mitchell & Thompson, London.

Solicitors for the defendant McManus Petroleums Limited, appellant: Carrothers & McMillan, London.

Solicitors for the Village of Port Stanley: Balfour & Graham, St. Thomas.

Solicitor for other defendants: W. S. McKay, St. Thomas.

[COURT OF APPEAL.]

Hebb v. Mulock and Newmarket Era and Express Limited.

Companies—Powers of Directors—Allotment of Shares—Good Faith—Control of Company.

An agreement was made between H and M for the amalgamation of two newspapers, owned or controlled by the respective parties. The agreement provided that all the assets of both newspapers should be transferred to a company, the assets of H's newspaper being valued at \$2,500 more than those of M's. It was provided that H should receive 161 shares of the company, and that M should have 138, with a further provision that M should "have the option of purchasing" an additional 25 shares at \$100 per share "at any time within a period of eighteen months from the date hereof." The agreement contained further elaborate provisions for securing to the parties equality of control of the company and of the newspaper to be published. M did not take up the additional shares within the 18 months, but, about two years after the execution of the agreement, negotiations for the sale of H's shares to M having fallen through, M applied for the shares, tendering the \$2,500 in payment. A resolution was adopted by the majority of the directors accepting this application and allotting the shares to M. H now sued to set aside this resolution and allotment.

Held, the action must fail. It was a well-settled principle that directors must act *bona fide* and in the interest of the company. *Percival v. Wright*, [1902] 2 Ch. 421; *Punt v. Symons & Co., Limited*, [1903] 2 Ch. 506; *Martin v. Gibson et al.* (1908), 15 O.L.R. 623; *Trustee of the Property of C. E. Plain Ltd. v. Kenley and Royal Trust Co.*, [1931] O.R. 75, applied. The written agreement contained no provision whereby M had bound himself to H not to apply for the 25 shares after the 18-month period, and a reading of the whole agreement made it abundantly clear that equality of control had been a fundamental objective of the parties. The 25 shares in question would give the parties an equality of interest in the ownership. The action of the directors in making the allotment must be viewed in the light of the provisions of the agreement and of all the surrounding circumstances. They were entitled to consider, *inter alia*, that H, in declining to agree to the allotment, was asserting that he was entitled to control of the company. The facts were clearly distinguishable from *Bonisteel v. Collis Leather Co. Limited* (1919), 45 O.L.R. 195, and there was nothing in that decision which invalidated this allotment. The interest of the company, in the circumstances, was the objective of equality which underlay the agreement between the parties, and the directors had acted wholly *bona fide* and in the interest of the company in making the allotment in question.

Judgment of Hogg J., *ante*, p. 312, affirmed.

AN APPEAL by the plaintiff from the judgment of Hogg J., *ante*, p. 312, [1945] 2 D.L.R. 737, dismissing the action.

25th and 26th September 1945. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW JJ.A.

R. R. McMurtry, K.C., for the plaintiff, appellant: Mulock was under no obligation to put the additional \$2,500 into the company, and we could not have sued for specific performance, because the agreement expressly gave him an option. [ROBERTSON C.J.O.: How could the directors ensure the carrying out

of the purposes of the agreement, as stated therein, without allotting these shares?] The agreement does not provide for equal ownership; Hebb's taking over of share control did not necessarily mean that he was going to interfere with the fundamental purpose of having an independent newspaper. If Hebb was not carrying out any term of the agreement, Mulock could have sued at once for specific performance. [ROBERTSON C.J.O.: But the agreement contemplated a much speedier way than that, by action of a board of directors constituted as provided in the agreement.]

[LAIDLAW J.A.: Do you go so far as to say that it was against the company's interest to allot these shares to Mulock?] I only need to say that if the directors allotted the shares to carry out their interpretation of the contract, and that interpretation was wrong, the basis of their action is gone. The contract did not bind the company. [LAIDLAW J.A.: But in the absence of dishonesty, breach of trust, or acting against the interest of the company, how far can the Court inquire into the directors' motives?] I shall submit authorities to show that the honest belief of the directors is immaterial.

If Mulock was under no obligation to the company, the whole basis of the trial judge's reasons falls to the ground.

My submissions are as follows:

1. The agreement, Ex. 1, gave Mulock an option to purchase 25 shares within 18 months, and nothing more.

2. The trial judge should not have admitted extrinsic evidence to contradict the express terms of the written agreement.

3. The evidence adduced at the trial is wholly consistent with the written contract.

4. In allotting the 25 shares, the directors purported to do so in pursuance of their interpretation of the agreement, and not in any way for the benefit of the company.

5. Apart from the agreement, the directors were not justified in so allotting shares as to alter the voting control of the company.

1. Clause 3 of the agreement is clear and unambiguous. The Court should therefore not give it an interpretation contrary to its plain meaning, which is the result if it is said that Mulock was under an obligation to buy these shares. Nothing in the agreement necessitates any other meaning. "Independence" is

not necessarily synonymous with equality of ownership. I refer to Selections from Williston on Contracts, rev. ed. 1938, s. 619, p. 493; 7 Halsbury, 2nd ed. 1932, pp. 330-1.

2. This point is based upon the well-known rules, laid down in such cases as *Re Durnford Elk Shoes Limited* (1916), 11 O.W.N. 59 at 60; *Charrington & Co., Limited v. Wooder*, [1914] A.C. 71 at 77.

3. In any event, the extrinsic evidence adduced at the trial is wholly consistent with the plain meaning of the written agreement. It conclusively established that Mulock was under no obligation to take up the additional 25 shares, but had at most a privilege to do so within the time specified.

4. The directors were not entitled to construe the agreement as they did. Since they purported to act upon an interpretation which is wrong, and on no other basis, their allotment cannot stand. If Mulock had no right to insist upon the issue of these shares at that time, and was under no obligation to pay the \$2,500 to the company, the directors had no right to act as they did.

5. Although directors have a discretion in allotting stock, this is subject to the limitation that it can be done only in the interest of the company and on a basis of equality among the shareholders, and in no case so as to alter the voting control, even if the directors believe that such an alteration is in the best interest of the company: *Punt v. Symons & Co., Limited*, [1903] 2 Ch. 506 at 515; *Martin v. Gibson et al.* (1908), 15 O.L.R. 623 at 630, 633; *Bonisteel v. Collis Leather Co. Limited* (1919), 45 O.L.R. 195 at 197, 199-201. [ROBERTSON C.J.O.: There may be much to be said against your assumption that Hebb had "control" before the issue of these 25 shares. He got no shares except under this agreement, and was not complying with its terms.]

The rule is also established in such cases as *Piercy v. S. Mills & Company, Limited*, [1920] 1 Ch. 77 at 78, 80, 82, 84; *Trustee of the Property of C. E. Plain Ltd. v. Kenley and Royal Trust, Co.*, [1931] O.R. 75, [1931] 2 D.L.R. 801, 12 C.B.R. 492.

[ROBERTSON C.J.O.: Is there no difference between taking the control from one person or group, and giving it to another, and merely destroying an existing control?] In principle, no. The rule is against *altering* control, and the difference is one of degree only.

[GILLANDERS J.A.: Miss Lyons was Mulock's nominee on the board of directors. Can it be argued that this allotment was in effect an issue by the directors to one of their number?] I think that is arguable, but have not been able to find any authority. [ROBERTSON C.J.O.: But there is nothing to indicate that Miss Lyons was always to vote in Mulock's interest, or to act otherwise than as an honest director.]

The Court is limited to the reasons given by the directors for their action. It is not open to this Court to find that the directors' conduct was justified on some other ground, not advanced by them. [LAIDLAW J.A.: If there was no bad faith on the part of the directors, are we concerned with their reasons? Why do you say this allotment was not in the best interest of the company?] Even where it is in the best interest of the company, the directors cannot make a one-sided allotment, which has the effect of altering the voting control: *Bonisteel v. Collis Leather Co. Limited, supra*, at p. 200. [ROBERTSON C.J.O.: You could make precisely the same attack if the allotment had been made within the 18 months.] No, because Hebb as a shareholder was bound by the agreement, and would have been estopped from objecting.

By this allotment, Mathews kept himself in office as a director, and that is his own understanding as given in evidence.

J. W. Pickup, K.C. (*W. B. Williston*, with him), for the defendant Mulock, respondent: The agreement between the parties in this case is important, but clause 3 thereof has been given an importance, by counsel for the appellant, which is out of place. It is plain, from the other clauses of the agreement, that the parties were arranging an agreement on the basis of equality of control, which became effective immediately. [LAIDLAW J.A.: The important point to me seems to be whether it was the understanding of the parties that the two men concerned were to have equality of control.] The agreement itself implies that they are already dealing with a situation that has been determined. The agreement as a whole clearly sets forth what the respondent intended to carry out. Even if the written agreement is to be considered in determining whether or not the appellant had the right to prevent the allotment by the company of further shares to Mulock, then upon the true construction of the agreement, even without extrinsic evidence, it

does not prevent the issue of the 25 shares after the 18-months' period. The agreement expressly affirmed Mulock's right, as against the appellant, to purchase the additional shares from the company. This agreement is published in as solemn a way as anybody could publish anything. In any event, apart from clause 3 of the document, it was the duty of the directors to look at all the surrounding circumstances and to consider the position taken by the appellant. In the final analysis, this case comes back to two questions: first, good faith, and secondly, the interest of the company. There has been no violation of any right of the appellant by the allotment by the company of the shares in question, regardless of the proper interpretation to be placed on the written agreement between the appellant and Mulock. The allotment of shares is a matter for the directors, and no shareholder has any right to prevent shares being allotted from the treasury, provided the directors act in good faith. It has been found by the trial judge that the directors did act in good faith. Regardless of the agreement between the principal shareholders, to which the company was not a party, it was the right and duty of the directors in allotting shares to have regard to the best interests of the company and what they considered to be the true intention and basis upon which the company was to be reorganized and operated and, in particular, to keep faith with the policy of the company as publicly announced in regard to the independent character of the newspaper.

The rules of law as to the admission of extrinsic evidence to interpret a written document do not really arise in this case. This is not an action between parties to an agreement, where one of the parties is endeavouring to enforce some right against the other, based upon a contract which they have reduced to writing. The agreement in question is not capable of the construction that as between the parties to it, it created a right in the appellant whereby he could prevent Mulock from subscribing for shares of the company after the expiration of the 18-months' period. The rule as to the admission of extrinsic evidence should not be applied where it would have the effect of deciding rights in disregard of another contemporaneous agreement reduced to writing and evidenced by the publication thereof in the press by both parties to the agreement.

J. J. Robinette, K.C., for the defendant company: We adopt the arguments made on behalf of the respondent Mulock. The

action of the directors must be tested in the light of all the circumstances known to the appellant. The agreement makes a distinction between the proprietary ownership of shares, and the control of the company. The appellant is saying in effect that the action of the board of directors deprived him of control. The agreement between the appellant and Mulock was intended to create an equality of control between them, even apart from the ownership of the shares; this is made clear by the provisions of clause 10, which provides that Mathews shall act as a director for a period of two years from the date of the agreement and for further periods of two years unless his trusteeship is terminated by notice. If his trusteeship is terminated by notice, clause 10 provides that the appellant and Mulock "will endeavour to agree on some other person to replace him." That paragraph, read as a whole, indicates that it is to be a continuing arrangement. The object of the agreement was to ensure equality of domination. If the directors did the fair thing, their actions are not open to attack. The appellant was threatening to carry on the business under his own sole control. The trial judge has found that there was good faith on the part of the directors. The allotment of shares was not against the interest of the company. The company was only interested in making certain it received enough money for its shares. [LAIDLAW J.A.: The only evidence is that it was in the interests of the company.] It cannot be seriously argued. It was not unfair to keep the appellant from getting control when he was not entitled to it under the agreement. Since the directors of the company, in allotting the shares, acted in good faith and not against the interest of the company, and not for their personal benefit, the allotment should not be set aside: *Spooner v. Spooner Oils Limited et al.*, [1936] 1 W.W.R. 561, [1936] 2 D.L.R. 634.

R. R. McMurtry, K.C., in reply: Mulock put himself in a position where he could obtain equal control, but was not obligated to do so. Clause 3 of the agreement expressly deals with the issue in this action. There is nothing in the other clauses dealing with ownership. The respondent Mulock cannot have the right without the obligation. It is not for the directors to convert themselves into a legal forum, if they thought the appellant had committed a breach of the agreement. *Spooner*

v. Spooner Oils Limited et al., supra, has no bearing on the point at issue in this case.

Cur. adv. vult.

10th October 1945. ROBERTSON C.J.O. agrees with GILLANDERS J.A.

GILLANDERS J.A.:—Mr. Justice Hogg, by a judgment dated 4th April 1945, dismissed the appellant's action to set aside the allotment to the individual respondent of twenty-five shares of treasury stock in the corporate respondent. From that judgment this appeal is taken.

The appellant was the owner and editor of a newspaper known as The Newmarket Era, published in the town of Newmarket, and the respondent Mulock controlled, by the beneficial ownership of shares, which, however, were not standing in his name, another newspaper also published in Newmarket under the name of The Express-Herald.

For some time the appellant had been endeavouring to interest the respondent Mulock in the amalgamation of the two newspapers on some mutually agreeable plan. Finally, in 1942, through the intervention of Mr. N. L. Mathews, K.C., a solicitor favourably known to both of the parties, they arrived at a satisfactory basis for amalgamation, involving, *inter alia*, two basic objectives—(1) the publication of one newspaper of an independent political character in place of the two newspapers then being published; (2) equality of interest and control between the appellant and the respondent Mulock.

An agreement in writing, dated 9th May 1942, covering the proposed amalgamation, was prepared and duly completed between the parties. Various provisions of this agreement are of importance in the issues involved in this appeal, and it seems desirable to have in mind the relevant matters it covered and on certain points its express provisions.

It had been agreed, in the course of discussion between the parties, that part of the assets of the appellant's newspaper would be transferred or sold to the corporation operating the respondent's paper and that the name of the latter corporation would be changed to "Newmarket Era and Express Limited". It was agreed that these assets were greater in value than those of the respondent's company passing into the amalgamation, by the

sum of \$2,500.00. To carry the purposes of the parties into effect, the agreement provided for the issue to the appellant, in payment for the assets he was transferring, of 161 shares of stock in the corporation which was to own and operate the continuing newspaper. The respondent Mulock was to retain, as compensation for the assets of his company being retained and used, 136 shares of stock in the continuing corporation. In addition to retaining the 136 shares of stock, the agreement expressly provided, as part of clause 3, that the respondent "shall have the option of purchasing a further twenty-five (25) fully paid up shares of the treasury stock of the Company, at a price of One Hundred Dollars (\$100.00) per share, at any time within a period of eighteen months from the date hereof."

The agreement further provided for the appellant acting as a director of the continuing company, and for the respondent Mulock, who did not wish to act personally as a director, appointing a nominee. Provision was further made for each of the parties transferring one share of stock in trust, for the benefit of each of the parties, to Mr. N. L. Mathews, K.C., in whom both parties had confidence, and for the appointment of Mr. Mathews "in order that the said Norman L. Mathews may be the third director of the said Company, representing both parties."

Provision was made for Mr. Mathews holding office for a period of two years, and for continuing for a period of two years unless he should resign, or one of the parties should give notice that he was "no longer satisfactory", this arrangement to continue for recurring periods of two years until terminated by resignation or notice, as specified. In the event of Mathews's death or resignation or the termination of his office by notice, as provided, it was agreed that the parties would endeavour to agree on some other person to act as trustee and director in his place, and in the event of their failure so to agree within a period of three months, then the two shares held by Mr. Mathews were to be transferred one to each of the parties. In the event of a successor to Mr. Mathews being appointed, it was provided that such successor should act as trustee and director under the same terms and conditions as were stipulated with regard to him.

Clause 13 of the agreement provided:

"13. The purpose of this agreement to amalgamate the two businesses is to carry on a printing and publishing business, and in particular to publish an independent weekly newspaper, that is to say, a newspaper which, while striving to report all viewpoints as the publisher and editor may judge matters worthy of space, shall not owe any allegiance to any political party, or any other group or individual, and shall be free to criticize or commend any political or other party or group, government, or individual, within the bounds of fair comment, as occasion may arise in the opinion of the publisher and editor. The directors shall not interfere in the editorial or news policy of the newspaper as above set forth, unless such policy is in their opinion contrary to the spirit of this agreement and to the conduct of an independent newspaper, or is prejudicial to the best interests of the newspaper."

Clause 14 provided in part:

"14. It is understood that the directors shall appoint the party of the Second part as publisher and editor of the newspaper to be published, but may dismiss him upon three months' notice, if, in their opinion, he is not conducting the business in a reasonably successful manner, or is not carrying out to a reasonable degree the intention of this agreement."

Provision was made for a minimum salary to be paid to the appellant as publisher and editor, subject to increase "as the directors shall deem advisable". It was provided that the publisher and editor should have full authority to manage the business "subject, however, to the approval of the directors".

Following the execution of this agreement, the appellant, on 14th May 1942, published an announcement of the impending amalgamation of the two newspapers in his newspaper *The Newmarket Era*. This notice stated in part: "The stock will be so arranged that no shareholder will hold a controlling interest and thus the paper will be free to maintain an independent character." Notice of the proposed amalgamation was also published in the respondent's newspaper. Apparently the amalgamation was effected and the appellant assumed the duties of publisher and editor of the amalgamated paper, and matters went along without incident until February 1944.

At the time of the making of the agreement, the respondent Mulock, for several reasons not important here, had desired

some time to arrange payment of the \$2,500 which would, on the valuations agreed upon, give the parties each an equal interest in the ownership of the company publishing the amalgamated newspaper. The respondent apparently did not keep the matter in mind, and it was February 1944, nearly twenty-one months after the date of the agreement, when, following an inquiry from him as to when, according to the agreement, he should take up the balance of the stock, it was found that the eighteen months' period had expired. Miss Lyons, a member of the firm of solicitors consulted by Mr. Mulock, who had drawn the agreement for both parties, and who was also the respondent's nominee on the board of directors, spoke to the appellant, telling him of the inquiry, that it appeared that the eighteen months had expired, and suggesting that probably this made no difference to the appellant. The appellant's answer to this was prompt. "I said that I would come and see her, and I saw her the same day and told her that I was going to take another position, and I therefore was of the opinion that either one party or the other should control the business and that I was ready to sell my interest to Colonel Mulock, and alternatively that I would ask that my wife be appointed a director and I would assume responsibility for the operation of the paper, that my wife be appointed a director instead of Mr. Mathews. I said that I would sell at the amalgamation price of \$11,000 without taking into account what depreciation had taken place since then".

Some negotiations followed the appellant's suggestion that he would sell out his interest completely. It would appear that at that time he had in mind giving up his position as publisher and editor of the newspaper and, in fact, in September 1944 he took another position.

On 24th April 1944, the appellant wrote to the respondent Mulock, wanting to know whether or not he intended to accept the appellant's offer to sell out, stating in part: "I must know whether you are going to take over the ownership or whether I am to retain control and responsibility." On 3rd May the appellant again wrote, "asking that Mr. Mathews return to me the share that he holds in trust for me, and that my wife be appointed a director, and I would ask that you choose between Mr. Mathews and Miss Lyons as the third director."

He wrote the respondent again on 2nd June, in part: "Our amalgamation agreement, you will remember, contemplated that you would take up 50 percent of the ownership, and provided for a trusteeship by Mr. Mathews, who was to hold a share in trust from each of us and to act as the third director. That arrangement worked very well but will not be appropriate now, when I must assume the responsibility for operating the business". He continues, purporting to give notice, pursuant to the agreement, that Mr. Mathews is no longer satisfactory to him as a trustee (although stating that he "has co-operated with me in every way") and asking for a meeting of shareholders to elect as two of the three directors his wife and himself.

No agreement having been reached on buying out the appellant's interest, on 5th June 1944 the respondent Mulock made written application to the respondent company for the purchase of twenty-five shares of capital stock, and attached to his application his certified cheque for \$2,500.

A meeting of directors was held on 9th June, at which, by a majority of two to one, the appellant voting against it, a resolution was passed accepting the respondent's offer and allotting to him the twenty-five shares of capital stock for which he had made application. The appellant then commenced this action.

It is urged that in purporting to accept the respondent's application and allot to him the shares in question, the directors were exceeding their powers—that the purported allotment was not made *bona fide* in the interest of the respondent company, but with the object and result of benefiting the respondent Mulock, and depriving the appellant of voting control. The whole issue turns on the validity of the allotment in question.

It is a well-settled and salutary principle that directors must act *bona fide* for the interest of the company: *Percival v. Wright*, [1902] 2 Ch. 421; *Punt v. Symons & Co., Limited*, [1903] 2 Ch. 506 at 515 and 516.

In *Martin v. Gibson et al.* (1908), 15 O.L.R. 623 at 631, Boyd C. says:

"The underlying principle of action is to be found in the language of Romilly, M.R., in *The York and North Midland Railway Company v. Hudson* (1845), 16 Beav. 485, 491, 51 E.R. 866, where he says: 'A resolution by shareholders . . . that shares . . . shall be at the disposal of directors, is a resolution

that it shall be at the disposal of trustees; in other words, that the persons intrusted with that property, shall dispose of it, within the scope of the functions delegated to them, in the manner best suited to benefit their *cestuis que trust*.' Now, the persons to be considered and to be benefited are the whole body of shareholders—not the majority, who may for ordinary purposes control affairs—but the majority plus the minority—all in fact who, being shareholders, constitute the very substance (so to speak) of the incorporated body."

To the same effect is the statement of Hodgins J.A. in *Trustee of the Property of C. E. Plain Ltd. v. Kenley and Royal Trust Co.*, [1931] O.R. 75 at 81, [1931] 2 D.L.R. 801, 12 C.B.R. 492.

"It has been laid down that a company cannot issue shares for the purpose of acquiring control of a company, for the reason that in issuing shares they are trustees of a fiduciary power given to them to do so, not for the benefit of individual shareholders but to be exercised *bona fide* for the general advantage of the company alone and not for other purposes. (See *Piercy v. S. Mills & Company, Limited*, [1920] 1 Ch. 77.)

"Palmer, in the 11th edition of his work on Company Law, says at p. 193:—

" 'In exercising these powers' (i.e. those authorised or not forbidden), 'whether general or special, directors must always bear in mind that they are trustees for the company, and must exercise the powers for the benefit of the company, and for that alone.' "

Much importance was placed by the appellant on the provisions of clause 3 of the agreement giving to the respondent Mulock an option to purchase a further twenty-five shares of stock at \$100 per share at any time within a period of eighteen months. It was strongly urged that the stock not having been taken up within the eighteen-month period, the control of the company was thereupon left with the appellant and any subsequent allotment of stock which would interfere with the appellant's control, was void and illegal.

For the respondent it was urged that the eighteen-month period had relation only to the price of \$100 per share.

The appellant does not complain about the price, admitting that it was sufficient if the respondent had the right to take up the stock, and therefore it is urged that the option to purchase

was still open. It is suggested that the use of the word "option" is a misnomer, and that on a proper construction of the agreement the respondent was in fact bound to take up the twenty-five shares of stock, that time was not of the essence, and that the application by and allotment to the respondent of the stock in question was only in fulfilment of what he was in fact bound to do.

I think it is unnecessary under the circumstances to resolve all the contentions advanced respecting this so-called "option". The written agreement contains no provision whereby the respondent Mulock bound himself to the appellant not to make application for the stock after the eighteen-month period. A reading of the whole agreement makes it abundantly clear that equality of control was a fundamental objective of the parties.

As previously mentioned, the twenty-five shares in question would give to the parties an equality of interest in the ownership. Quite apart from the objective of equality of interest, and whether or not such equality was brought about, the provisions of the agreement previously mentioned clearly point to balance and equality of control, *e.g.*, the constitution of the board of directors, the appellant to be one, the nominee of the respondent to be one, and the third to be Mr. Mathews as trustee for both parties; the rather elaborate provisions respecting Mr. Mathews' continuance as the third director, provision for him remaining for two years certain, provision in case of his death, resignation or termination of office that the parties would endeavour to agree upon some other person to take his place and that it was only on failure to agree for a period of three months that the qualifying shares were to be transferred to the beneficial owners. All these provisions indicate the importance attached to maintaining balance of control. This is accentuated by the specific powers and duties which the parties agree are to be vested in the board of directors, *e.g.*, to effect the change of name agreed upon; the power to interfere and control the editorial policy of the newspaper if, in their opinion, such policy is contrary to the spirit of the written agreement "and to the conduct of an independent newspaper, or is prejudicial to the best interests of the newspaper." While provision is made to appoint the appellant publisher and editor at a minimum salary, the directors are given power to "dismiss him upon three months'

notice if, in their opinion, he is not conducting the business in a reasonably successful manner, or is not carrying out to a reasonable degree the intention of this agreement."

These provisions in the written agreement for equality of control were not at variance with, but in furtherance of, the basis of the negotiations between the parties.

The action of the directors in making the allotment must be viewed in the light of the provisions of the agreement and of the surrounding circumstances. The first consideration which Mr. Mathews says was present in his mind when making the allotment was:

"It carried out the original intention of the parties, the whole agreement with which I was familiar, the amalgamation was based on the fact that there was to be equality of interest. I felt in fairness to both parties that that intention should be given effect to."

Among the circumstances open to consideration by the directors was the fact that, from the time the matter of taking up the twenty-five shares was first raised in February 1944, the appellant had denied the respondent's right to take up the shares because the eighteen-month period had expired, and had asserted both verbally and in writing that he was in control, and called for a meeting of shareholders to rearrange the directors with the evident object of confirming and assuring his control of the company's affairs. His attitude indicated that, while seeking to take advantage of his interpretation of the provisions of the agreement respecting the option, to deny the respondent an equality of interest, he overlooked or ignored various elaborate provisions of the agreement, not tied in any way to the exercise of the option, designed to protect the equality of control. For example, he gave no consideration to the provisions requiring the parties to endeavour to agree on some other person to replace Mr. Mathews and providing that only in the event of their failure so to agree after a period of three months could any other steps be taken.

The respondent Mulock not having bound himself not to apply for or take up twenty-five shares after the eighteen-month period had expired, there was no reason why the directors should not deal with the application in the way best designed to carry out the objective of both parties. It seems apparent that the allotment of the shares in question would accomplish

the purpose of equality of interest and control which, from the outset, underlay the whole transaction.

Much reliance was placed by the appellant on the decision in *Bonisteel v. Collis Leather Co. Limited* (1919), 45 O.L.R. 195, and it was urged that, even although the directors made the allotment without any ulterior motive and, as they conceived it, in the interests of the company, it was a one-sided allotment of stock with a view to affecting the control, and was improper under the decision in the *Bonisteel* case. In my view, the facts are to be clearly distinguished. As pointed out by the learned trial judge, the evidence in that case established that the action of the directors deprived the plaintiff of the control of the shares and was made for "the purpose of shifting from one body of shareholders to another the power of electing directors and so of controlling the company's policy." That decision follows *Martin v. Gibson*, *supra*, and, in my view there is nothing in the decision which, under the circumstances of the case at bar, casts any shadow on the allotment here in question. The directors were trustees for the shareholders as a whole; as said by Chancellor Boyd in *Martin v. Gibson*, "not the majority, who may for ordinary purposes control affairs—but the majority plus the minority—all in fact who, being shareholders, constitute the very substance (so to speak) of the incorporated body."

For all practical purposes, the shareholders here consisted of the appellant and the respondent Mulock. Their joint objective and purpose, as evidenced by the agreement in writing and supported by all the other circumstances, was to effect equality of both interest and control. It cannot be thought that either of the parties would have considered the proposal with the prospect of turning his assets into the continuing company and being left without equality of voice in the management of its affairs. The interest of the company was, under the circumstances, the objective which underlay the agreement, and to which both parties subscribed in their written agreement. In this view, the directors were acting wholly *bona fide* and in the interests of the company in making the allotment in question.

In fact, it might be strongly argued that to deny the application under all the circumstances could only be viewed as being

in the interests of the appellant personally as opposed to the interests and objectives of the company.

The appeal should be dismissed with costs.

LAILAW J.A.:—I concur in the opinion of my brother Gildanders and desire only to set forth in brief form the particular considerations leading to my judgment.

(1) The very essence of the agreement made between the respondent and the appellant was that they should each have equal interest in and control of the amalgamated enterprise.

(2) The omission of the respondent to purchase twenty-five shares of the treasury stock of the company within a period of eighteen months from the date of the agreement did not in any way alter or affect the real intention of the parties to the amalgamation agreement.

(3) That omission is not a factor in determining the sole question in controversy, *viz.*, whether the issue by the directors of the company of twenty-five shares of the treasury stock to the respondent was valid.

(4) The answer to that question depends (a) upon the good faith, or otherwise, of the directors in making the allotment, and (b) upon whether or not the allotment was for the benefit of all shareholders—the majority plus the minority.

(5) The directors acted in good faith in making the allotment and “within the scope of the functions delegated to them, in the manner best suited to benefit their *cestuis que trust*”: per Romilly M.R. in *The York and North-Midland Railway Company v. Hudson* (1845), 16 Beav. 485 at 491, 51 E.R. 866, cited by Boyd C. in *Martin v. Gibson et al.* (1908), 15 O.L.R. 623 at 631.

(6) The allotment was consistent with the true intention of all persons having any beneficial interest in the company as to equality of control. Conversely a refusal of the directors to allot the shares would have defeated that intention.

(7) Finally there was evidence to show that the appellant was seeking to exercise control in the constitution of the board of directors and otherwise, and it would not be in accordance with his agreement with the respondent that he should be in a position to do so.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Chitty, McMurtry, Ganong & Wright, Toronto.

Solicitors for the defendant Mulock, respondent: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.

Solicitor for the defendant company, respondent: John J. Robinette, Toronto.

[COURT OF APPEAL.]

Darnell v. Darnell et al.

Divorce—Evidence—Uncorroborated Evidence of Defendant—Admissions—Rule to be Observed by Court.

There is no absolute rule of law that an admission of adultery made in evidence by a husband or wife is not sufficient evidence, in the absence of confirmatory proof, on which the Court can make a finding of adultery. Such evidence should be regarded with extreme suspicion and distrust, but if the trial judge, so regarding it, nevertheless concludes that it is trustworthy, he is entitled to accept it and to grant the appropriate relief. *Robinson v. Robinson and Lane* (1858), 1 Sw. & Tr. 362 at 393, applied; *Ward v. Ward*, [1937] O.W.N. 188; *Hodgins v. Hodgins*, [1942] O.R. 440; *Morrow v. Morrow*, [1914] 2 I.R. 183, referred to.

AN APPEAL by the plaintiff from the judgment of Hope J., [1945] O.W.N. 482, dismissing an undefended action for divorce.

26th September 1945. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW JJ.A.

A. Lewis, K.C., for the plaintiff, appellant: We were clearly entitled to rely upon the subsequent adultery as reviving the condoned adultery, without naming, or adding as a party defendant, the person concerned in the second adultery: *Kay v. Kay and Crandon*, [1944] O.R. 252, [1944] 2 D.L.R. 421; *Morris v. Morris*, [1944] O.W.N. 76, [1944] 1 D.L.R. 621.

The authorities firmly establish that corroboration is not essential if the admission by the defendant spouse seems to be, and is accepted as, trustworthy: *Robinson v. Robinson and Lane* (1858), 1 Sw. & Tr. 362 at 393, 164 E.R. 767; *Getty v. Getty*, [1907] P. 334; *Williams v. Williams* (1866), L.R. 1 P. & D. 178; *Woolf v. Woolf*, [1931] P. 134; *Ward v. Ward*, [1937] O.W.N. 188, [1937] 2 D.L.R. 425. Corroboration is essential only when made so by statute, and there is no statutory provision to that effect applicable to matrimonial causes. The question of credibility really did not arise in this case. The trial judge did not say that he disbelieved any witness, and he was bound to act

on the evidence, legally admissible, as establishing adultery on both occasions alleged by us.

Cur. adv. vult.

11th October 1945. The judgment of the Court was delivered by

LAIDLAW J.A.:—This is an appeal by the plaintiff from a judgment of Hope J., dated the 15th May 1945, dismissing an undefended action for divorce, custody of infant children and maintenance.

The appellant was absent in England on vacation in 1937. After she returned to her home in Guelph, Ontario, her husband admitted that during her absence he had committed adultery with his co-defendant. The appellant forgave him and condoned the offence. She lived with him until 1939, when a separation agreement was made by them and they did not afterwards live together. The action for dissolution of marriage was not commenced until 6th March 1945.

The only evidence in support of the prayer for a dissolution of the marriage was given by the plaintiff and by the defendant husband. She testified that in 1937 he admitted to her that he had committed adultery with his co-defendant; that for the sake of the children she continued to live with him; that in 1939 she accused him of having improper relations with Mrs. H. and that there was an "awful row over it"; that he admitted "he had stayed all night with Mrs. H."; that as a result of that misconduct a separation agreement was entered into and he left their home; and finally that she has not forgiven him for his admitted misconduct with Mrs. H.

The defendant husband waived his right under s. 7 of The Evidence Act, R.S.O. 1937, c. 119. He then admitted in evidence that he had committed adultery with his co-defendant in 1937 during the time his wife was in England; that in 1939 he committed adultery with Mrs. H., but did not do so with his co-defendant after he was forgiven by his wife in 1937; that, so far as he knew, the name of Mrs. H. first came to the knowledge of his wife in connection with this action just before the separation in 1939; that he told his wife in 1939 he had "stayed nights with her" (Mrs. H.).

At trial counsel for the appellant argued that the alleged adultery of the defendant husband with his co-defendant in

1937 was sufficiently proved by evidence of his admission to his wife and by his admission at trial; that the admission of the defendant husband to the appellant and at trial that he committed an act, or acts, of adultery in 1939 with Mrs. H., subsequent to the time when his offence in 1937 with his co-defendant was condoned, was sufficient proof of facts to revive the first offence; and finally that there was sufficient proof in law to entitle the appellant to the relief asked for.

The learned judge stated: "I think it is quite clear that the evidence of the husband or wife alone must be corroborated, either by a witness, or at least by strong surrounding circumstances especially where a party has made admissions, or a confession." He concluded as follows: "After hearing the evidence of the defendant, and fully weighing the circumstances, I do not feel that I am justified in accepting it in its wholly uncorroborated form."

With much respect I cannot agree with the learned trial judge "that the evidence of the husband or wife alone must be corroborated". There is no absolute rule that an admission made in evidence by a husband or wife of an act of adultery on his or her part is not sufficient evidence, in the absence of confirmatory proof, upon which the Court can make a finding of adultery. On the contrary, the Court can with appropriate caution make such a finding and grant a decree upon the admission of adultery by the husband or wife charged therewith. The law has been laid down by Cockburn C.J. in *Robinson v. Robinson and Lane* (1858), 1 Sw. & Tr. 362 at 393, 164 E.R. 767, as follows:

"Now the evidence, as has been before observed, consists entirely of admissions made by the wife herself; and here a question presents itself, as to how far the admissions of a wife charged with adultery, unsupported by any confirmatory proof, can be acted upon as conclusive evidence on which to pronounce a divorce. If this Court had been a Court of purely ecclesiastical jurisdiction, the 105th canon, which prohibits the granting of a divorce on the sole and unsupported testimony of the wife, would have precluded us from acting on this evidence. But as this Court is not a Court of ecclesiastical jurisdiction, nor bound in cases of divorce a vinculo by rules of merely ecclesiastical authority, it is at liberty to act, and bound to act, on any evidence legally admissible, by which the fact of adultery is estab-

lished; and if therefore there is evidence, not open to exception, of admissions of adultery by the principal respondent, it would be the duty of the Court to act on such admissions, although there might be a total absence of all other evidence to support them. No doubt the admissions of a wife unsupported by corroborative proof should be received with the utmost circumspection and caution; not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such admissions, if, though unsupported, they could effect their purpose, are sufficient to render it the duty of the Court to proceed with the utmost caution in giving effect to statements of this kind; the more so as it must always be borne in mind that the co-respondent, though not in a legal point of view interested in the result, inasmuch as from the absence of evidence available as against him, he is entitled to an acquittal, has yet, socially and morally, the deepest interest in the result. Nevertheless, if, after looking at the evidence with all the distrust and vigilance with which, as we have said, it ought to be regarded, the Court should come to the conclusion, first, that the evidence is trustworthy, secondly, that it amounts to a clear, distinct, and unequivocal admission of adultery, we have no hesitation in saying that the Court ought to act upon such evidence, and afford to the injured party the redress sought for."

This case is referred to in *Ward v. Ward*, [1937] O.W.N. 188 at 190, [1937] 2 D.L.R. 425; *Hodgins v. Hodgins*, [1942] O.R. 440 at 443, [1942] 3 D.L.R. 494. See also *Morrow v. Morrow*, [1914] 2 I.R. 183.

I desire, however, to emphasize that the Court must exercise great caution and vigilance in such cases and regard the evidence with circumspection and distrust. Proceeding in this manner, the trial judge may, if he deems it proper, conclude that the evidence is trustworthy. The mere absence of corroboration does not make the unsupported testimony of a husband or wife unbelievable or insufficient in law to prove the fact that adultery was committed as alleged.

If the learned judge had reached the conclusion that after looking at the evidence with the utmost distrust he nevertheless found it to be worthy of belief and that the fact of adultery was proved, this Court would not interfere with his conclusions.

Likewise it was within the discretion of the trial judge to say that the unsupported evidence of the defendant husband was not trustworthy, and this Court would refrain from substituting the judgment of its members in place of one in a position of much advantage in weighing the evidence. But in this case the learned judge rested his judgment on the basis that the evidence of the defendant required corroboration. He felt that he was not justified in accepting it "in its wholly uncorroborated form", and held that "the evidence of the husband or wife alone must be corroborated".

In the circumstances, the Court is quite free to reach such conclusions and make such findings from the evidence as may be necessary for determination of the case. Exercising appropriate care, as required, I conclude that the evidence of the defendant husband is credible and that the Court ought to act upon it. I find that all facts necessary to afford the redress sought by the appellant have been proved. The judgment of the Court below ought to be set aside, and a judgment for divorce in the usual form ought to be substituted in place thereof.

In addition to a decree of divorce the plaintiff asked for custody of her two infant children and for an allowance for maintenance of them. There is not sufficient evidence upon which this Court can properly decide the matters involved in these claims, and they should be left to be dealt with by a proceeding of the usual character to determine custody and maintenance of infants.

The appellant is entitled to her costs of the action and of this appeal from the defendant Darnell.

Appeal allowed with costs.

Solicitor for the plaintiff, appellant: Alexander M. Lewis, Hamilton.

[COURT OF APPEAL.]

Siebel v. Vereshack.

Master and Servant—Injury to Employee—Use of Dangerous Substance—Special Statutory Provisions—The Factory, Shop and Office Building Act, R.S.O. 1937, c. 194, ss. 1(d), (e), 41(1)(d), 55, 81—Who is “Employer”—Department Manager, Employed by Same Company—The Workmen’s Compensation Act, R.S.O. 1937, c. 204, ss. 8, 14, 68, as amended—Election to Accept Compensation—Jurisdiction of Board.

The plaintiff’s health was seriously affected as a result of using cement containing benzol in a factory where she was employed. She applied for, and received, compensation under The Workmen’s Compensation Act, and later brought an action for damages. The action was originally brought against several defendants, but, as the result of discontinuances and dismissals on consent, it went to trial only as against the manager of the department in which the plaintiff had been employed.

Held, the action must be dismissed. The defendant did not know of the existence of benzol in the cement, and there was no evidence on which it could be found that this lack of knowledge was the result of any absence of reasonable care, and he was therefore not guilty of negligence at common law. Nor was he civilly liable by reason of the provisions of The Factory, Shop and Office Building Act, since he was not the plaintiff’s “employer” within the meaning of that Act, and was not in any way personally at fault.

Per LAIDLAW J.A., dissenting: The plaintiff having applied for, and received, compensation, it was within the exclusive jurisdiction of the Workmen’s Compensation Board to determine whether or not her right of action had been taken away by Part I of The Workmen’s Compensation Act. Proceedings in the action should therefore be stayed to permit the parties to obtain a ruling from the Board. *The Dominion Cannery Limited v. Costanza et al.*, [1923] S.C.R. 46, applied.

AN APPEAL by the plaintiff from the judgment of Roach J., *infra*.

16th to 20th October 1944. The action was tried by ROACH J. without a jury at Toronto.

Lewis Duncan, K.C., for the plaintiff.

D. B. Goodman, for the defendants.

25th January 1945. ROACH J.:—At the opening of the trial counsel for the plaintiff filed a consent signed by him, as solicitor for the plaintiff, and by the solicitors for the defendant Gutta Percha & Rubber Limited, to the discontinuance of the action as against that defendant. Consents were also filed to the dismissal of the action, without costs, as against the defendants Foster, Fingerhut and Durable Waterproofs Limited. The action as against those defendants, therefore, is dismissed without costs. The plaintiff’s claim as against the defendant Vereshack alone remains to be considered.

During the relevant period the plaintiff was an employee of the defendant Durable Waterproofs Limited. That company operated a factory on Adelaide Street, in the city of Toronto, where it manufactured, from materials purchased by it, sundry articles, including leather products. The plaintiff was employed in the leather products division, where leather handbags were manufactured. She was what was known in the industry as a "wet cementer". She stood at a bench, which was about waist-high, and applied wet cement, for adhesive purposes, to the leather and certain linings, in the making of the handbags. The cement was contained in an open bowl having a diameter of about nine inches, and a depth of about four inches, within easy reach, on the bench, and was applied with a small brush.

The type of cement originally supplied to the plaintiff by her employer, for use as aforesaid, was a rubber cement, that is a cement containing a rubber base. In 1942, due to the exigencies of the war, the use of cement containing rubber was forbidden in the handbag industry. Thereafter various substitutes were tried by the Durable company, but none was satisfactory. In the fall of 1942 the defendant Fingerhut gave the company a sample of cement which he had for sale. At the request of her employer the plaintiff tested it in her work, and reported to her employer that its adhesive properties were satisfactory. As a result the company purchased the Fingerhut cement, and, commencing on 23rd November 1942, and continuing until the plaintiff became ill on 19th April 1943, that was the cement supplied to and used by her in her employment. It was a benzol cement, that is, it had a benzol base. The proportion of benzol was 91.91 per cent. by weight and 91.76 per cent. by volume.

It transpired that this cement was manufactured by the defendant Gutta Percha & Rubber Limited, and was put up by that company mostly in gallon containers. Labels had been pasted on those containers by the Gutta Percha company, showing that company as the manufacturer, and showing also that the cement contained benzol. Fingerhut, in order to hide his source of supply from the Durable company, removed part of the label from some of the containers, and the whole label from the balance. He estimated that only about ten to fifteen per cent. of all the containers sold by him to the Durable company had any part of the label on them.

On 19th April 1943 the plaintiff became ill. She consulted her physician on 22nd April, and it was discovered that she was suffering from benzol poisoning. Benzol is highly volatile, and there is not the slightest doubt that this unfortunate plaintiff had been poisoned by the vapours which escaped from the cement as she used it day after day in the course of her employment.

The defendant Foster is the president and general manager of Durable Waterproofs Limited. The defendant Vereshack is manager of the leather products division of the company. Under him is a foreman named Mintz. In the order of internal responsibility, therefore, Mintz was responsible to Vereshack and Vereshack to Foster.

In this action the plaintiff is claiming damages by reason of her having been poisoned as aforesaid. As against the defendant Vereshack, who is the only defendant with whom we are now concerned, the action having been either discontinued or dismissed as against the others, it is alleged that he was negligent in that he did not give any warning to the plaintiff as to the dangerous character of the cement; that he failed to protect her against its poisonous content; that he breached the provisions of The Factory, Shop and Office Building Act, R.S.O. 1937, c. 194, by failing to label the containers so as to show the benzol content, and by failing to provide proper ventilation in the factory to carry off the poisonous fumes.

The defendant Vereshack denies that he was negligent, and states that he had no knowledge of the dangerous character of the cement; that there was no relationship existing between him and the plaintiff which imposed any liability upon him for her injuries; that with full knowledge the plaintiff accepted the risk of her employment; that the industry in which the plaintiff was engaged comes within the provisions of Part I of The Workmen's Compensation Act, R.S.O. 1937, c. 204, as amended, that the plaintiff applied to, and accepted, compensation from the Workmen's Compensation Board in respect of her injuries, and that the plaintiff has no status to maintain this action.

I am thoroughly satisfied on the evidence that Vereshack had no knowledge that the cement contained any ingredient that might cause injury to the health of a person using it. He did not handle the containers when they arrived at the factory. Had the labels been on the containers, it would have come to

the knowledge of persons handling them that the cement contained benzol. I accept the evidence of Vereshack that he never saw any labels. He examined the cement. It had an odour something like that of gasoline. He tested it for inflammability. There was nothing about it to arouse any suspicion that its use was dangerous. The plaintiff was using it daily, and she had no suspicion that it was dangerous. I can find no negligence on the part of Vereshack.

The Factory, Shop and Office Building Act contains multifarious provisions for the protection of employees in factories and other premises, and provides for the imposition of penalties upon the employer, and in certain instances upon others, where those provisions are breached. The statute imposes certain duties upon the employer in favour of the employee. Where an employee is injured due to a breach of that duty the employer may be liable in damages, subject to the limitations contained in The Workmen's Compensation Act, but it is not arguable that the statute creates any liability against another employee. Vereshack and the plaintiff were both employees of a common employer, even though they differed in rank. The plaintiff's claim, in so far as it is based on an allegation of a breach of some provisions of that Act or the regulations made thereunder, must therefore fail.

The plaintiff has not been left without remedy. She comes within Part I of The Workmen's Compensation Act, and Durable Waterproofs Limited is one of the industries named in Schedule I of the Act. She availed herself of the remedy which that Act gave her and elected to claim compensation under that Act. Over a period of many weeks the Workmen's Compensation Board paid her a total of \$430.67 by way of compensation for loss of earnings, and also paid her the sum of \$715.50 for out-of-pocket expenses. It was argued that she had not so elected. The fact is that while in the hospital, and fully appreciating what she was doing, she signed the form of application required by the Board, and thereafter received and accepted the periodical payments made by the Board. This amounted to election: see *McIver v. Tammi* (1921), 49 O.L.R. 179, 62 D.L.R. 534; *Cooper v. Canadian Northern Ontario Railway Company* (1924), 55 O.L.R. 256.

If the plaintiff had any rights as against Vereshack, the Board would be subrogated to them and would be entitled to

bring an action in her name or in its name or in their names against him. The present action was not authorized by the Board and has not been brought under any arrangement with the Board.

Quite apart from any of the provisions of The Workmen's Compensation Act, I think this action as against Vereshack must fail. It is, therefore, dismissed as against him with costs if asked.

Action dismissed with costs.

10th, 11th, 17th May 1945. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and MCRUER J.J.A.

Lewis Duncan, K.C. (C. L. Dubin, with him), for the plaintiff, appellant: The Workmen's Compensation Act, R.S.O. 1937, c. 204, provides an excellent remedy in the case of minor injuries, but in the case of serious injury it is greatly in favour of the employer. It is our contention that the respondent is liable because he did not do what a reasonably prudent man would have done in the circumstances. He introduced a poison into the premises, and did not comply with the provisions of The Factory, Shop and Office Building Act, R.S.O. 1937, c. 194, and the regulations made thereunder, for the protection of employees. [LAIDLAW J.A.: If the appellant has no right to maintain this action, need we consider the grounds of appeal?] The Workmen's Compensation Act is not a bar to our action. It deals only with accidents, while this is an industrial disease: *Scotland v. The Canadian Cartridge Company* (1919), 59 S.C.R. 471, 50 D.L.R. 666; *Williams v. Guest, Keen and Nettlefolds, Limited*, [1926] 1 K.B. 497. The appellant did not elect to take compensation under the Act: *Sershall v. Toronto Transportation Commission*, [1938] O.R. 694 at 707, [1938] 4 D.L.R. 369. In the alternative, even if the appellant did elect to take compensation, the respondent is not entitled to rely upon that fact as a defence: *The Toronto Railway Company v. Hutton* (1919), 59 S.C.R. 413, 50 D.L.R. 785, [1920] 1 W.W.R. 396; *Smith v. Conklin and Garrett Limited*, [1943] 1 W.W.R. 332, [1943] 2 D.L.R. 163, 55 C.R.T.C. 201, affirmed [1943] 2 W.W.R. 622, [1943] 3 D.L.R. 797, 56 C.R.T.C. 156; *Cooper v. Canadian Northern Ontario Railway Co.* (1924), 55 O.L.R. 256. [LAIDLAW J.A.: The facts in this case would seem to be quite distinguishable from those in the *Sershall* case. Here the appellant re-

ceived compensation and medical care. Can it be said that she did not elect within the meaning of the Act?] That depends upon the interpretation of the word "elect". Is she to be deemed to have elected, no matter what her condition? Surely the Legislature did not intend to deprive a person of a common law right. [LAIDLAW J.A.: You have not obtained the consent of the Board to the bringing of this action. No application has been made to it under s. 14(2) of the Act. Where special machinery is provided by statute for the adjudication of a question before a tribunal, must that not be employed?] It is not now open to the respondent to apply under that section. The *Cooper* case is distinguishable in this respect.

The respondent did not exercise the care required of a reasonably prudent man. The Legislature has guarded against such dangers as that of benzol poisoning. Legislation and regulations have been passed, inspectors are employed, and inspections are made, for this purpose. The evidence discloses that this respondent tested the cement for its adhesive qualities, but not as to content. [LAIDLAW J.A.: Is there anything to show that the respondent knew that there were only two kinds of cement—one dangerous and one harmless?] [ROBERTSON C.J.O.: There is a finding of fact on that matter which is directly against you.] [MCRUER J.A.: Do you put your case at all on the ground that there is a statutory obligation on a person using such a substance to guard against danger?] The Factory, Shop and Office Building Act, by s. 41, imposes an absolute obligation upon the employer. The respondent comes within the definition of "employer" in s. 1(d) of the Act. If he had performed his duties as provided in the statute the appellant would have been protected against the injuries she received.

[ROBERTSON C.J.O.: What is the effect of s. 81 of the Act?] It implies that there may be an action for damages. We can sue anyone whom we are not prevented from suing by express statutory enactment. If there is a statutory breach which comes within the provisions of The Workmen's Compensation Act, then the rights created by The Factory, Shop and Office Building Act are taken away. Persons protected by The Workmen's Compensation Act cannot be sued.

Section 41(1)(d) of The Factory, Shop and Office Building Act has placed an absolute responsibility on the employer, the breach of which gives rise to an action for damages. [ROBERTSON

C.J.O.: The Act gives a very arbitrary meaning to the word "employer", which includes people who are not employers in any ordinary meaning of the word.] It was the intention of the Legislature to reach the person who actually committed the wrong. In reading the statute as a whole, one perceives that there is an attempt to reach such a person in two ways. The Legislature is trying to avoid an injustice by an exception, and that is the meaning of s. 75. We must also consider s. 55(2). [ROBERTSON C.J.O.: I do not think that in construing this Act we should find liabilities that are not plainly imposed.] The Legislature has done its best to produce an Act which will result in the liability of a person who was the real offender under the Act. [ROBERTSON C.J.O.: Section 76 cannot apply to the respondent as a person keeping a factory.]

The statutory duty is an absolute one, and is not dependent upon knowledge: Charlesworth on Negligence, 1938, p. 413. The appellant is entitled to damages for the breach of the statutory duty: *Groves v. Wimborne*, [1898] 2 Q.B. 402; *Wyant (Wynant) v. Welch*, [1942] O.R. 671, [1943] 1 D.L.R. 13; *Lees v. Dunkerley Brothers*, [1911] A.C. 5. The respondent had in his possession and control a dangerous thing, and he is liable for all mischief occasioned by it: *White et ux. v. Steadman*, [1913] 3 K.B. 340 at 347-9; *Charing Cross Electricity Supply Company v. Hydraulic Power Company*, [1914] 3 K.B. 772 at 785; *Theyer v. Purnell*, [1918] 2 K.B. 333; *Burfitt v. A. and E. Kille*, [1939] 2 K.B. 743; *Dokuchia v. Domansch*, [1945] O.R. 141 at 146, [1945] 1 D.L.R. 757. This is particularly so when the dangerous thing is also a poison: *West v. Bristol Tramways Company*, [1908] 2 K.B. 14. [LAIDLAW J.A.: A recent case of interest here is *Read v. J. Lyons & Co. Ltd.*, [1944] 2 All E.R. 98.] [McRUER J.A.: Is there any difference between an injury occurring on the premises and one caused by things escaping?] *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, is the classical authority upon escapes. The tendency has been to enlarge the liability and to systematize the rules respecting the handling of dangerous things. [ROBERTSON C.J.O.: The grounds you are now arguing would seem to indicate liability of the company if anyone.] The respondent is a person who brought a dangerous thing upon the premises.

We should have had a trial by jury. *Prima facie*, we are entitled to such a trial.

We refer also to Charlesworth, *op. cit.*, pp. 209, 211, 212, 219, 291, 292; Charlesworth on Dangerous Things, *passim*; Clerk and Lindsell on Torts, 9th ed. 1937, pp. 502-3; Winfield on Torts, 1st ed. 1937, p. 567, 23 Halsbury, 2nd ed. 1936, p. 629, para. 883.

D. B. Goodman, K.C., for the defendant Vereshack, respondent: There was no relationship of employer and employee between the appellant and the respondent. We owed no duty to the appellant. [LAIDLAW J.A.: As manager of the department, ordering that product for use by the company, is the respondent not identified with a dangerous thing?] In order to succeed against the respondent, the appellant must show that he was negligent. The finding of the trial judge in this respect is amply supported by the evidence. The respondent had no knowledge of the dangerous ingredient in the cement. This is not a case where he took the cement and told the appellant to use it. In *Shea v. Inglis* (1905), 11 O.L.R. 124, a distinction was made in the case of the master who was liable for someone else's negligence. Here the appellant and the respondent were both in the same relationship to a common employer: *Harrison v. Toronto Motor Car Limited and Krug*, [1945] O.R. 1 at 15, [1945] 1 D.L.R. 286; *Cowans et al. v. Marshall* (1897), 28 S.C.R. 161. Since there was no relationship of master and servant, any right of action against the respondent would have to be based on actual personal negligence: *Junor v. International Hotel Co. Limited* (1914), 32 O.L.R. 399, 20 D.L.R. 960.

If the appellant ever had any rights or a cause of action against the respondent, she now has no status because of her application to, and acceptance of benefits from, the Workmen's Compensation Board: The Workmen's Compensation Act, s. 8(5), as re-enacted by 1939, c. 54, s. 1; s. 14(1), as amended by 1943, c. 37, s. 5; *McIver v. Tammi* (1921), 49 O.L.R. 179 at 183, 62 D.L.R. 534; *Scott v. American Air Lines Inc.*, [1944] O.W.N. 296. [MCRUER J.A.: What right have we to decide whether or not there has been election? Is that right not vested exclusively in the Board?] No, this Court has power to say that the appellant has lost her rights by accepting compensation: *Scott v. American Air Lines Inc.*, *supra*.

The appellant contends that the respondent did not act as an ordinarily prudent person, and accordingly was negligent. The appellant had at least equal means of knowing of the dangerous or noxious content of the cement, and the respondent was under

no greater obligation to provide for the appellant's safety than she was herself: *Murphy v. The City of Ottawa and Doyle* (1887), 13 O.R. 334 at 341. [ROBERTSON C.J.O.: Do you go so far as to ask us to find that the appellant was negligent? That is a very different matter from finding the employer negligent under the statutory provisions.] In an action for negligence, it is evidence of negligence if the act done was in contravention of a statute. Here the respondent complied with all the regulations. He had no knowledge, and there was therefore no negligence. There must be either actual knowledge, or a lack of knowledge which he should have had. All he did here was to order the product, and it was something that could be used safely: *Buchanan v. Lashbrook* (1923), 54 O.L.R. 662; *Rudd v. Bell et al.* (1887), 13 O.R. 47 at 51. The crux of the matter is that the respondent owed no duty to the appellant. [LAIDLAW J.A.: If the statute imposes a positive duty on the respondent, and he fails to perform it, does not that failure constitute negligence?] Only if it is through actual negligence that the duty was not performed. Here we have a finding of the trial judge that we were not negligent. The Factory, Shop and Office Building Act distinguishes between an office and a factory. The respondent could be responsible only if he had actually given a direction to another employee, which that other had carried out. To bring a dangerous article on to the premises is not negligence. After it was there, the appellant was in a position to protect herself: *Falsetto v. Brown*, [1933] O.R. 645 at 647, [1933] 3 D.L.R. 545; *Black v. Ontario Wheel Company* (1890), 19 O.R. 578 at 582; *Junor v. International Hotel Co. Limited*, *supra*.

Aside from The Workmen's Compensation Act, there is no liability on the employer. At common law there would not be responsibility even of the actual employer. [LAIDLAW J.A.: If a manufacturer, or any person, proposes to use a dangerous thing in the process of manufacturing, what difference does it make whether he knew or should have known?]

White v. Steadman, *supra*, is in favour of our contention rather than that of the appellant. In *Charing Cross Electricity Supply Company v. Hydraulic Power Company*, *supra*, there was an admission of liability. In both *Dokuchia v. Domansch*, *supra*, and *Farrant v. Barnes* (1862), 11 C.B.N.S. 553, 142 E.R. 912, the defendant knew of the danger. *West v. Bristol Tram-*

ways Company, supra, has to do with an unnatural or extraordinary user of a dangerous substance. In *The City of Glasgow v. Taylor*, [1922] 1 A.C. 44, a child ate poisonous berries, no warning having been given to the public that the berries were poisonous. [LAIDLAW J.A.: In all those cases, the basis of complaint was that there had been an omission, a failure to do something.]

The appellant did not use the cement on any order or direction of the respondent, but was merely performing her own well-defined duty to their common employer. The Legislature, in The Factory, Shop and Office Building Act, intended to reach the person having direct control. Since the trial judge found as a fact that the respondent was not aware of the dangerous nature of the cement, and since it was not of an inherently dangerous or noxious nature, known to the respondent but concealed from the appellant, the respondent would not be responsible in law even if he did owe a duty to the appellant: *Smith v. Onderdonk* (1898), 25 O.A.R. 171.

Lewis Duncan, K.C., in reply: The respondent owed a duty to the appellant by reason of their proximity. The standard of duty involves a consideration of proximity: Charlesworth on Negligence, p. 12; Charlesworth on Dangerous Things, pp. 183-5. [ROBERTSON C.J.O.: It is necessary to remember the position of the respondent. In a case of this kind, the difficulty is to determine who was the person who owed a duty to see that there was proper ventilation.] The Factory, Shop and Office Building Act indicates the standard of care to be applied. [ROBERTSON C.J.O.: The difficult point in this case is why this respondent should be liable in damages.] [MCRUER J.A.: This respondent was a link in the chain of responsibility. If someone lower in the chain failed to do his duty, was there actionable liability on the respondent's part for not seeing that the other person's duty was performed?] We submit so. [LAIDLAW J.A.: If the respondent had actual knowledge that this compound was dangerous, then, you say, he owed a duty to the appellant at common law. Does the same duty arise if he ought to have known, but did not?] The respondent is one of the employers in this chain of employment. The scheme of the Act is to cover all people who might personally have had anything to do with the introduction of benzol into the premises. It was the desire of the Legislature to cover everybody, so that

the real culprit could not escape. [LAIDLAW J.A.: Your difficulty is to fix the respondent with a duty at common law, apart from actual knowledge.]

We refer further to Pollock on Torts, 14th ed. 1939, p. 20; Charlesworth on Negligence, pp. 209, 290. This was a normal commercial activity, which became dangerous because poison was introduced: Pollock, *op. cit.*, pp. 350-3. The doctrine of *volenti non fit injuria* is no defence where there is a breach of statutory duty.

Cur. adv. vult.

16th October 1945. ROBERTSON C.J.O.:—This is an appeal from the judgment of Mr. Justice Roach, dated 25th January 1945, after the trial of the action before him, without a jury, at Toronto. There were five defendants in the action, but it was discontinued against one of them, and, by consent, it was dismissed without costs against three other defendants, leaving only the defendant Samuel Vereshack, against whom the trial proceeded. By the judgment appealed from, the action was dismissed as against him, with costs.

The appellant is a young woman who was in the employ of the defendant Durable Waterproofs Limited. She was engaged in that department where the manufacture of ladies' handbags was carried on. In her work she was required to use a wet cement, which was applied with a brush, to materials such as leather and lining used in the manufacture of ladies' handbags. While she was so employed it became necessary for the company to find a new cement to use for their purposes, because of certain war regulations that forbade the use of the rubber cement that they had been using. The defendant Fingerhut sold to the company a liquid cement manufactured by the defendant Gutta Percha & Rubber Limited, and this was given to the appellant to be used in her work. This liquid cement contained benzol, the fumes of which were inhaled by the appellant while she worked with it, and, in time, caused her substantial injury. The appellant received certain compensation under The Workmen's Compensation Act, R.S.O. 1937, c. 204, in respect of her injuries, and later she brought this action.

I have already mentioned that one of the defendants was Durable Waterproofs Limited, her employer, and that two other defendants were Fingerhut and Gutta Percha & Rubber Limited,

through, or from, whom the harmful liquid cement was got. A fourth defendant was Charles Foster, who was the president, and, apparently, the substantial owner of Durable Waterproofs Limited, and who, as general manager, actively exercised an oversight over its business. The respondent here, Samuel Vereshack, was the manager of the department of Durable Waterproofs Limited in which the appellant was employed. As against him negligence at common law is charged, and he is also charged with breach of duty under The Factory, Shop and Office Building Act, R.S.O. 1937, c. 194.

I may say at once that, in my opinion, the appellant suffered substantial injury from the use of the liquid cement supplied to her for use in her work, and the amounts allowed her under The Workmen's Compensation Act were not full compensation for her loss and injuries. Whether the respondent is liable to her in respect of the damages she claims is, however, another question. The trial judge could find no negligence at common law on the part of the respondent, and I agree with this conclusion. There remains for consideration the claim under The Factory, Shop and Office Building Act.

The appellant claims that the respondent comes within the definition of "employer" contained in s. 1 of the statute, and that duties were imposed by the statute, and by regulations made under it, upon the respondent as "employer", the performance of which would have protected the appellant against the injuries she sustained.

"Employer" is defined by s. 1(*d*) of The Factory, Shop and Office Building Act as follows:

"(*d*) 'Employer' as applied to a factory, shop, bakeshop or restaurant shall mean any person who in his own behalf, or as the manager, superintendent, overseer or agent has charge of any factory, shop, bakeshop, or restaurant, and employs persons therein, and in the case of an office building shall include the superintendent, manager or caretaker thereof". Durable Waterproofs Limited was, beyond doubt, an "employer" within this statutory definition, as well as in the ordinary sense of the word. It is not so clear that the respondent also was an "employer" within the meaning of the statute, and certainly he was not, in any ordinary sense, an "employer". Durable Waterproofs Limited had manufacturing premises on Adelaide Street West in Toronto, where it occupied a six-storey building

and carried on several lines of manufacture in various divisions or departments, more or less separate, but all under the general supervision and management of its president and general manager, Foster. The respondent was manager of the leather products department, in which the appellant was employed. He had been, at one time, the owner of a business which he carried on under the name "Durable Leather Products". He had sold this business to the defendant Foster, who brought it into his own company, of whose business it became one of the several departments. While the respondent had the position of manager of this one department in the manufacturing business carried on by Durable Waterproofs Limited, his actual duties were somewhat limited, even in his own department. Sales were his special care. He had charge also of designing, and the purchase of materials and supplies. The factory operations, however, were in charge of a foreman, Mintz, who was an experienced operator, while the respondent was not. Mintz also employed the help in the factory. The respondent says that he, himself, did not employ the persons who worked there, although he concedes that he might have had authority to do so had he ever chosen to exercise it. In supplying the cement that is complained of, Fingerhut, who sold it, saw the respondent and left a sample with him. The respondent turned the sample over to Mintz, with directions to see whether it was suitable for their purpose. Mintz having reported back that it was suitable, the respondent gave Fingerhut an order for a supply.

It is not an entirely simple matter to determine, in the circumstances, whether the respondent comes within the statutory definition of "employer". The respondent had not charge of a factory, if all the manufacturing departments of Durable Waterproofs Limited located in the same building are deemed to constitute the factory. Foster appears to have been the only person who had supervision of all the departments. The respondent was manager of only one department. The definition of "factory" in s. 1(e) of the statute requires consideration in determining whether the respondent was an employer within s. 1(d).

Having regard to the limited scope of respondent's management, with Foster as general manager in charge of all the operations of Durable Waterproofs Limited, and Mintz as the man entrusted by the company with the immediate conduct of the factory operations in the leather products division, and to the

difficulty in applying to the respondent the words "employs persons therein" contained in the statutory definition, either in the sense in which the words apply to the company itself as one who employed persons through its agents, or in the sense that it was he who directly did the employing, I am of opinion that it has not been shown that the respondent was an "employer" within the statutory definition. The statutory definition is an arbitrary one, and a consequence of including the respondent within it would be to expose him to penalties, as well as to liability in damages, for the breach of the duties imposed by the statute upon an employer. It is not enough to show that the respondent was styled "the manager" of one department of manufacture in the company's business. It is only a manager who has charge of a factory and who employs persons therein, to whom the statute applies the word "employer". In this case Foster, as general manager, had charge of the whole factory, and it was Mintz who employed the persons in respondent's department. If the respondent is properly freed of the charge of negligence at common law, as I think he must be, there is nothing to justify the straining of the word "employer" for the purpose of imposing duties and obligations upon him that, in truth, were not his.

The learned trial judge has not, in his reasons for judgment, discussed the question whether the respondent came within the statutory definition of "employer", but, no doubt, that question was discussed before him, as it would seem to arise at once upon the pleading of s. 41(1) (*d*) in para. 13 of the statement of claim. He did, however, in dealing with the claim made under The Factory, Shop and Office Building Act, definitely say that the respondent was an employee, and he distinguishes his position under the statute from that of an employer. In that respect the conclusion that I have reached was also the conclusion of the learned trial judge.

As the appellant's case against the respondent, based upon The Factory, Shop and Office Building Act, depends upon establishing that he was an "employer", a finding that he was not is sufficient to make an end of the appellant's case. I do not think it is necessary that we should keep this action alive in order that the Workmen's Compensation Board may be asked to determine whether any right of action, that the appellant might otherwise have had, is taken away by Part I of The

Workmen's Compensation Act. If the Board has, by subrogation to the appellant, any right of action against the respondent, any such right of action may be preserved by express reservation. The action with which we are dealing is plainly the appellant's own action. She disputes any election by her to accept compensation from the Board and to forego her right of action. In dismissing her action, we do so without prejudice to the Board, which is not, in any sense, before us.

Before parting with the case I should call attention to another difficulty that, upon consideration, I think may stand in the appellant's way, if the respondent were to be regarded as an "employer" within the meaning of The Factory, Shop and Office Building Act. Section 81 of that Act provides as follows:

"81. In all cases between employer and employed or their representatives where liability for damages arises by reason of any violation of this Part the liability shall be subject to the limitations contained in *The Workmen's Compensation Act*."

Although the respondent is not an "employer" within The Workmen's Compensation Act; yet if he were found to be an "employer" within The Factory, Shop and Office Building Act, clearly he would be an "employer" within s. 81 of that Act, and this action would be a case between employer and employed, where liability for damages arose by reason of a violation of that Part of the Act. What then is the effect of the concluding words of s. 81, that "the liability shall be subject to the limitations contained in The Workmen's Compensation Act"? It may, of course, be answered that The Workmen's Compensation Act contains no limitations of liability in the case of a person in the position of the respondent, but only in cases of employers and their workmen, as defined in The Workmen's Compensation Act. The result of that construction of s. 81, however, would be that one who is, in the ordinary sense of the word, an employer, and who truly bears that relationship to the injured person, would benefit by the limitation of liability, while another would be liable without any such limitation who truly is not in that relationship, and is subjected to liability only by the arbitrary definition of "employer" contained in the statute, and who has not had the benefit of the employee's services, and who, in some conceivable circumstances, would not have had it within his power to remedy what was not as The Factory, Shop and Office Building Act pre-

scribed. Section 81 has been in the Act a long time, but I have not been able to find any decision upon it. Its proper interpretation would, however, be necessary to determine in this case if the respondent were held to have been an "employer" within the Act.

I would dismiss the appeal, with costs, reserving all rights of the Workmen's Compensation Board.

LAILAW J.A. (*dissenting*):—An action was commenced, by writ of summons, on 9th March 1944, amended 26th May 1944, against Charles Foster, Allan J. Fingerhut, Samuel Vereshack, Gutta Percha & Rubber Limited, and Durable Waterproofs Limited. Counsel subsequently consented to the dismissal of the action as against Charles Foster, Allan J. Fingerhut, and Durable Waterproofs Limited, without costs, and to the discontinuance of the action as against Gutta Percha & Rubber Limited without costs. After trial at the sittings of the court at Toronto without a jury, Roach J. (now J.A.) delivered judgment, dated the 25th day of January 1945, dismissing the action as against Samuel Vereshack, and, in accordance with the consent of counsel, as against Charles Foster, Allan J. Fingerhut, and Durable Waterproofs Limited. The plaintiff now appeals from that part of the judgment whereby the action is dismissed as against Samuel Vereshack.

For the purposes of my judgment it is unnecessary to state the facts in detail. The appellant was employed in the year 1942 and for the first four months of 1943 in the course of manufacture of handbags and other articles; her work required the use by her of a liquid cement containing benzol. It is alleged, *inter alia*, in the statement of claim that the business was carried on by Charles Foster and Durable Waterproofs Limited in partnership under the firm name and style of Durable Leather Products; that the respondent Vereshack was manager and an executive officer of Durable Waterproofs Limited; that Vereshack was a person to whose orders the appellant was bound to conform and did conform; that Vereshack (and others or one or more of them) supplied the said cement to the appellant for use in her employment, and that he was aware of the dangerous nature of it. The appellant is said to have suffered benzol poisoning by use of the cement in the course of her employment, and it is alleged that the loss or damage sustained by her was

caused by breach of duty owing in law by the respondent to the appellant.

The respondent in his statement of defence sets forth in para. 8 thereof that "if the Plaintiff ever had any rights, or cause of action against him, none of which is admitted but expressly denied, the Plaintiff has no status to maintain this action by reason of her application to and the receipt by her of compensation from the Workmen's Compensation Board of the Province of Ontario, as aforesaid, and by reason of the provisions of the Workmen's Compensation Act, particularly section 8(5) as amended by chapter 54, 1939 Statutes of Ontario, and section 14(1) as amended, and this defendant pleads and relies upon the said Statute".

After the appellant became disabled, and before the issue of the writ of summons against the respondent (and others), she furnished to the Workmen's Compensation Board details and particulars on a form under the heading "Workman's Report of Accident" and received certain compensation under the provisions of Part I of The Workmen's Compensation Act. The employer's name, given by the appellant, appears in the said report as "Durable Leather Products", and that firm apparently completed and signed several reports on file with the Board.

There was exhaustive argument heard by the Court on the questions pertaining to the liability of the respondent. However, in view of the conclusion I have reached, I think it is unnecessary and undesirable at the present time to express any opinion in respect thereof. I direct my attention only to the issue raised by the respondent in his pleading, quoted in part *supra*, as to the right of the appellant to bring this action. It will be convenient to reproduce some of the relevant parts of The Workmen's Compensation Act, as follows:

Section 8(1) (as amended by 1943, c. 37, s. 2): "Where an accident arising out of and in the course of his employment happens to a workman under such circumstances as entitle him or his dependants to an action against some person other than his employer the workman or his dependants if entitled to compensation under this Part may claim such compensation or may bring such action."

Section 8(5) (as re-enacted by 1939, c. 54, s. 1): "No employer in Schedule 1 and no workman of an employer in Schedule 1 or dependant of such workman shall have a right of action

against any employer in Schedule 1 or against any workman of any such employer in any case within the provisions of subsection 1”

Section 14(2): “Any party to an action may apply to the Board for adjudication and determination of the question of the plaintiff’s right to compensation under this Part, or as to whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination shall be final and conclusive.”

Section 68(1): “The Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect to which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any court”

Part I of The Workmen’s Compensation Act applies to the industries mentioned in Schedules 1 and 2 thereof and to employments therein (s. 119). In such industries and employments a statutory liability is created and imposed upon employers to provide or to pay compensation in the manner, to the extent, and subject to the exceptions set out in the statute whenever “personal injury by accident arising out of and in the course of the employment is caused to a workman” (s. 2). Also, “where a workman suffers from an industrial disease and is thereby disabled . . . and the disease is due to the nature of any employment in which he was engaged . . . the workman . . . shall be entitled to compensation as if the disease were a personal injury by accident and the disablement were the happening of the accident, . . . ” (s. 115(1) as amended by 1942, c. 41, s. 4 (1)). Wide power, authority and discretion is conferred upon the Board. “The decisions of the Board shall be upon the real merits and justice of the case, and it shall not be bound to follow strict legal precedent.” (s. 68(4)). It may reconsider “any matter which has been dealt with by it” or rescind, alter or amend “any decision or order previously made” (s. 68(3)).

The question arises whether the Board has exclusive jurisdiction to determine whether this action is one the right to bring which has been taken away by the provisions of Part I of the statute. That question is raised as a substantial issue in the course of the action. The respondent in his statement of de-

fence, quoted in part *supra*, expressly pleads that "the plaintiff has no status to maintain this action", and relies, in particular, upon the provisions of ss. 8(5) and 14(1) of the statute, as amended. It is argued that the appellant applied for and received compensation from the Workmen's Compensation Board; that the appellant elected to claim compensation under Part I of the Act; that the Board is subrogated to the rights, if any, of the workman against the respondent; that the appellant has no right of action against the respondent; that the right to bring any such action has been taken away by Part I of the statute. Finally it is argued that the jurisdiction to examine into, hear and determine these matters and questions is vested in the Workmen's Compensation Board exclusively by virtue of s. 68(1) of the Act. I accept that argument. I am of the opinion that this Court has no jurisdiction to entertain the matters or questions mentioned, and that the Legislature required that they should be examined into, heard and determined solely by the Board. This opinion is founded upon and follows the authority of the Supreme Court of Canada in *The Dominion Cannery Limited v. Costanza et al.*, [1923] S.C.R. 46, [1923] 1 D.L.R. 551. In that case the plaintiffs sued for damages in consequence of having contracted typhoid fever from drinking the water supplied by their employers. The trial judge held that the injury was not caused by "accident" and that the plaintiffs could not proceed under The Workmen's Compensation Act. A judgment for damages was entered against the defendant and affirmed by the Appellate Division. It was held, Duff J. dissenting, "that where such an action is brought the court is free, if not obliged, *proprio motu* if want of jurisdiction is not pleaded, to take cognizance of the provisions of the Act and stay the proceeding until the right to maintain it is determined by the board." Duff J. decided that "The question whether or not the plaintiff can maintain his action must be raised by way of defence or exception." In the case presently under consideration, that question is expressly raised by way of defence, and the following views of Duff J., at p. 56, are applicable:

" . . . I think the argument in favour of the view that the jurisdiction of the board is an exclusive jurisdiction to deal with the defence as to the right to maintain a particular action in the Supreme Court, or rather the question whether or not in a particular case such right has been taken away by the provi-

sions of the Workmen's Compensation Act, may be put upon very solid grounds. . . . when, in addition to the circumstance that the defence or exception is a new one and to the fact that the statutory procedure for establishing it is newly created, there are obvious considerations to be drawn from the object and policy of the enactment pointing to the conclusion that the procedure provided for determining the issue is intended to be the exclusive procedure, then I can see no reason why effect should not be given to that conclusion unless at all events there are practical considerations which forbid it."

At p. 57, he says: " . . . if the question as to what does or does not constitute an 'accident', if the question whether on a given state of facts an accident has or has not occurred in the course of the workman's employment, or whether the accident does or does not arise out of the workman's employment, if such questions are generally to be passed upon by the Supreme Court with the usual concomitants by way of appeal, it is easy to see the possibility of a jurisprudence arising marked by the not very happy characteristics of that which has grown up out of the English Workmen's Compensation Act." . . . "I think there are excellent practical reasons for assuming that the legislature did not contemplate such a duplication of jurisdiction in respect of these questions."

Anglin J., with whose judgment the majority of the Court concurred, reached the conclusion that " . . . the question of the plaintiffs' right to bring and maintain this action 'arises under' Part I and also that it is 'a matter or thing in respect to which power, authority or discretion is conferred on the Board.' " He was of the opinion (p. 61) that " . . . by giving to the board 'exclusive jurisdiction to examine into, hear and determine' all such matters and questions the legislature intended to oust and did oust the jurisdiction of the ordinary courts to entertain them, and required that they should be examined into, heard and determined solely by the board." Finally I quote his decision (p. 67) that " . . . it is a case in which the courts have been divested by statute of jurisdiction over the subject-matter".

Following the authority quoted, I would direct that proceedings upon the pending appeal should be stayed to permit of an application being made to the Board under s. 14(2) for its "adjudication and determination . . . as to whether the [present] action is one the right to bring which is taken away by"

Part I of The Workmen's Compensation Act. Likewise in accordance with that authority, a certificate of the Board's decision may be filed with the Registrar of this Court, and the appeal may then be disposed of.

MCRUER J.A.:—The facts of this case are stated in the judgment of Roach J. in the court below.

Three questions arise for determination:

1. Ought this Court to stay the proceedings in the action until the parties have applied to The Workmen's Compensation Board for a ruling as to whether the appellant's right to bring the action has been taken away under the provisions of The Workmen's Compensation Act?

2. Was the learned trial judge right in holding that the respondent was not guilty of any negligence causing or contributing to the injuries suffered by the appellant?

3. Was liability imposed on the respondent by virtue of the provisions of The Factory, Shop and Office Building Act, R.S.O. 1937, c. 194?

If the last two questions are not answered in favour of the appellant, the first question need not be answered.

The learned trial judge has found as a fact that the respondent had no knowledge that the cement contained any ingredient that might cause injury to the health of a person using it. On the argument counsel was unable to point to any evidence that would justify the Court in finding that the lack of knowledge of the injurious quality of the cement was due to the absence of reasonable care on the part of the respondent.

The respondent was the manager of the leather products department of Durable Waterproofs Limited. He says that he managed "the executive end of the business". His duties mainly involved the suggestion of designs, selling and general purchasing. Early in the year 1942, the usual rubber cement having been taken off the market, one Fingerhut, a salesman, mentioned to the respondent that he had for sale a cement that was used in the leather trade. The respondent asked for a sample, which he turned over to a foreman named Mintz, who was in charge of production in the factory, and asked him to report whether it was satisfactory or not. No instructions were given to the foreman to have the cement analyzed for poisonous ingredients. The evidence does not justify a finding that the

respondent ought to have suspected that the cement contained a poisonous substance. The labels on the cans, as received from the manufacturer, showed that the cement had a benzol base, which might render it dangerous when used under certain circumstances. The learned trial judge found as a fact that the respondent at no time saw these labels. The evidence shows that, in large part, they were removed from the cans—apparently by Fingerhut, in order to conceal his source of supply.

After the sample had been tested by Mintz and the appellant, an order was placed for a considerable quantity of the cement, which was thereafter used by the appellant as an employee of Durable Waterproofs Limited. There appears to be no doubt that the appellant suffered serious injury from benzol poisoning. However, I think the learned trial judge's finding that the respondent was not guilty of negligence is amply borne out by the evidence, and cannot be interfered with.

It is argued on behalf of the appellant that even if the respondent is not shown to be liable at common law, a statutory liability is imposed by the provisions of The Factory, Shop and Office Building Act.

The restrictive provisions relied on by counsel for the appellant are contained either in the statute or in regulations passed pursuant thereto. Section 41(1)(d) of the statute provides that the *employer* of every factory shall ventilate the factory in such a manner as to keep the air reasonably pure and so as to render harmless, as far as reasonably practicable, all gases, vapours, dust or other impurities generated in the course of any manufacturing process.

Section 1(d) defines "employer" as used in the Act and as applied to a factory, to mean "any person who in his own behalf, or as the manager, superintendent, overseer or agent has charge of any factory . . . and employs persons therein."

It is contended that the appellant's injuries were caused by reason of the fact that the portion of the factory in which she was employed was not properly ventilated as provided by ss. 1(d) and 41(1)(d), so as to render harmless the benzol fumes given off from the cement, and that the respondent came within the definition of "employer" as used in the Act, and was, therefore, liable in damages, notwithstanding the fact that he may not have had any direct responsibility for the regulation of the ventilation of the factory.

The validity of this argument must be determined by a consideration of the relevant provisions of the statute and the regulations. It is true that the statute is one passed for the purpose of protecting employees and must be applied as such, but I think it is also true that there are certain provisions of the statute which are purely punitive, while others are protective.

As against Durable Waterproofs Limited, the regulating provisions of the statute might well give a cause of action, were it not for the provisions of The Workmen's Compensation Act, but as against an individual who may not be able to alter or control such a matter as the ventilating system, without the consent of some superior authority, the provisions of the statute are not to be applied with the same effect. A mere statement of the proposition is enough to indicate the injustice that would arise by imposing liability in damages on an employee in the position of the respondent, when, on the evidence, it must be assumed that he was not one with power to authorize structural changes in the building.

Furthermore, before any liability could be imposed on the respondent under ss. 1(d) and 41(1)(d), it must be shown that he, as manager, overseer or agent, had charge of the factory and employed persons therein. The evidence does not show that the defendant employed anyone in the factory. He was an employee subject to the orders of one Foster, the general manager. The duty imposed under the statute is one that exists between an employer and those employees that are employed by him, and not between an employee and other employees who may be of a lesser rank in the level of employment. I, therefore, conclude that s. 41 does not impose liability on the respondent.

It is also argued that liability is imposed on the defendant by the regulations passed under the authority of s. 55, which provides as follows:

"55.—(1) Regulations may be made by the Lieutenant-Governor in Council for the protection of persons engaged in any industrial process involving the use or manufacture of benzol, or of any other poisons, or of any dangerous or harmful substances, or of their preparations or compounds,—

"(a) prescribing the conditions under which such poisons or substances may be used or manufactured and the labelling of the containers".

Subs. 2 of s. 55 reads as follows:

"A factory or shop in which a contravention of this section or of any regulations made thereunder occurs shall be deemed to be kept so that the safety of the persons employed therein is endangered."

Under s. 70, penalties are imposed on any person who keeps a factory so that the safety of persons employed therein is endangered.

Regulation No. 1, passed under the authority of s. 55, provides: "Where lead or its compounds or benzol are prepared for use or used in any industrial process, special precautions must be taken." There would appear to be no doubt that Durable Waterproofs Limited was, under the provisions of the statute and the regulations, required to take special precautions, and also that, failing to do so, it might be said that the factory was one kept so that the safety of the persons employed therein was in danger. But can it be said that the factory was kept by the respondent within the meaning of the Act? I think not. If civil consequences flow from s. 55 and the regulations, they were imposed on Durable Waterproofs Limited, and not on an employee in the position of this respondent. This view is fortified by an examination of the penal sections. These sections recognize the primary responsibility of the person who keeps the factory, but, at the same time, make provision for punishing the individual employee who may be actually at fault in the failure to observe the statute or the regulations. I cannot read into these sections an implication that a senior employee is to be rendered civilly liable for the failure of one under him to observe the provisions of the statute, just because he may stand in the chain of authority between the general manager of the corporation that operates the business and the defaulting employee. The appellant having failed to show that the respondent was personally at fault, I fail to see how the provisions of s. 55 or of the regulations assist her.

While I cannot help but have great sympathy for the unfortunate appellant, I have come to the conclusion that whatever rights she may have, no cause of action has been made out against the respondent. Having come to this conclusion, it is unnecessary for me to deal with the first point hereinbefore raised. The disposition of this case should be, however, without

prejudice to any rights the Workmen's Compensation Board might have by way of subrogation or otherwise.

I would dismiss the appeal with costs, if asked.

Appeal dismissed with costs, LAIDLAW J.A. dissenting.

Solicitor for the plaintiff, appellant: Lewis Duncan, Toronto.

Solicitors for the defendant Vereshack, respondent: Goodman & Rosenberg, Toronto.

[LAIDLAW J.A.]

The Town of Barrie v. Tuck.

Interpleader—Jurisdiction of Courts—Distinction between Sheriff's Interpleader and Others—Amount Involved—Value of Property Seized in Execution—Rules 2(b), 10, 625, 644, 766.

Rule 10, in its present form, makes it plain that interpleader proceedings by a sheriff are part of the proceedings "in the original cause or matter", and where a sheriff seizes or intends to seize property under an execution issued out of a County Court, and a claim is made to that property, the sheriff is entitled to apply in the County Court for relief by interpleader even if the value of the property seized or intended to be seized is more than \$500. Such an application for interpleader is governed by Rule 644(2), which contains no limitation as to the amount involved, and Rule 644(1) applies only to applications for interpleader by persons other than sheriffs. *Isbister v. Sullivan* (1888), 16 O.R. 418, distinguished; *Re Meretsky and Balish* (1923), 53 O.L.R. 605, discussed.

A MOTION for an order of prohibition.

5th October 1945. The motion was heard by LAIDLAW J.A. in chambers at Toronto.

I. Levinter, K.C., for the applicant, Ella J. Tuck.

J. R. Cartwright, K.C., for the Town of Barrie.

D. F. Maclaren, for the Sheriff of the County of Simcoe.

19th October 1945. LAIDLAW J.A.:—This is an application by a claimant of goods and chattels taken in execution by a sheriff under a writ of execution issued in a County Court. The applicant asks for a prohibition order in respect of interpleader proceedings by the sheriff in the County Court.

The action was commenced in the County Court of the County of Simcoe, and judgment for the plaintiff was delivered by His Honour Judge Harvie on the 22nd day of December 1944. The defendant appealed to the Court of Appeal for Ontario. The appeal was dismissed with costs (*ante*, p. 443, [1945] 3 D.L.R. 311). The costs of the trial and appeal were

taxed and allowed to the plaintiff in the sum of \$667.60, and a writ of *fi. fa.* was issued out of the County Court of the County of Simcoe, directing the sheriff to levy this amount from the goods and chattels of the defendant. Goods and chattels of a value in excess of \$500 were taken in execution by the sheriff on the 11th June 1945. Thereafter a claim to the goods and chattels seized by the sheriff was made by the present applicant, Ella J. Tuck.

Upon application of the sheriff, in the presence of counsel for the claimant and for the Corporation of the Town of Barrie, an order, dated 6th July 1945, was made by His Honour Judge Harvie, directing Ella J. Tuck and the Corporation of the Town of Barrie to proceed to the trial of an issue in the County Court of the County of Simcoe.

By notice dated the 25th day of September 1945, the claimant asks that an order of prohibition be made as against the Town of Barrie and the Sheriff of the County of Simcoe and the Judge of the County Court of the County of Simcoe, on the grounds: (1) that there is no jurisdiction to grant relief by interpleader in the said County Court of the County of Simcoe; (2) that the applicant was not sued in the County Court; and (3) that the alleged debt, money, goods and chattels in question exceed in value \$500.

The right to relief by interpleader proceedings, the power of the Court to grant such relief, and the procedure by which persons entitled thereto can obtain it, must be found in the Rules of Practice. The Rules and the practice and procedure in actions in the Supreme Court apply and extend to actions in the County Court "so far as the same can be applied." (Rule 766).

The right to relief is given by Rule 625 to two classes of persons seeking it, namely:

(1) A person under liability for any debt, money, goods or chattels for or in respect of which, (a) he is sued, or (b) he expects to be sued.

(2) A sheriff acting, or intending to act under a writ of execution.

An application for relief by a person in one class differs from an application made by a person in the other class, both in character and in practice. An applicant in the first described class must be "under liability", and either be sued or expect

to be sued. The subject of adverse claim is "any debt, money, goods or chattels". A sheriff is not under liability. He is not a person who is sued, or expects to be sued. The subject of claim is "money, goods or chattels, lands or tenements taken or intended to be taken in execution under a writ of execution, or . . . the proceeds or value thereof".

The procedure for interpleader relief sought by a claimant, other than a sheriff, is by way of originating notice. (Rule 10 (1)). The proceeding is an action within the meaning of that word, as used in the Rules of Practice (Rule 2(b)), but an application by a sheriff is an interlocutory application made in the original cause or matter. (Rule 10(2)). It is not an action, but is, in a sense, an ancillary proceeding to enable the rights of the parties to the action to be completely determined.

Bearing in mind these distinctions, I examine the Rules showing the cases in which relief may be granted in a County Court, and consider in particular the limitation of jurisdiction of that Court. By Rule 644(1)(a) a person sued in the County Court may be an applicant therein; in such a proceeding there is no limitation imposed in respect of the nature or value of the property in question. By Rule 644(1)(b), a person who is not sued in the County Court may also apply for relief by interpleader, but it is expressly provided that such an applicant can obtain interpleader relief only if the value of the debt, money, goods or chattels in question does not exceed \$500. This provision, by express relation to the subject of "debt, money, goods or chattels", applies, in my opinion, to persons seeking relief who are within the class of persons "under liability" and (a) are sued, or (b) expect to be sued. The applicant may be under liability and sued in the Supreme Court, or he may expect to be sued without knowing in what Court an action will be commenced. In either case, he can, by originating notice, make application for relief in the County Court, providing the value of any debt, money, goods or chattels in question does not exceed \$500.

Although it would appear at first reading together of clauses (a) and (b) of subs. 1 of Rule 644 that all persons, of whatever position or interest, are included, it is my view as indicated that this part of the Rule applies only to applicants in the first class I have discussed above, namely, persons under liability in respect of a debt, money, goods or chattels who are sued or expect

to be sued by one or more persons making adverse claim thereto. It does not include sheriffs.

By subs. 2 of the Rule it is expressly provided that where a sheriff is the applicant for relief, the application may be made to the judge of his own county. There is no restriction upon that right of the sheriff to make application in an action in the County Court, and no limitation of the power of that Court to grant relief by interpleader, irrespective of the value of the money, goods or chattels, lands or tenements taken, or intended to be taken, under a writ of execution, or the proceeds thereof. To hold that Rule 644(1) (b) is applicable to interpleader proceedings by a sheriff would mean that no relief can be granted in the County Court in which an action was commenced and carried to judgment if the debt, money, goods or chattels taken or intended to be taken in execution under a writ of execution issued in that Court exceeded in value \$500. No application could be made by the sheriff in such circumstances in the Supreme Court, by reason of the provisions of Rule 10(1) and (2). Thus, in such a case the procedure for relief by interpleader could not be taken by the sheriff by interlocutory application or originating notice in either Court. The sheriff might perhaps restrict his action under a writ of execution, so that the value of the debt, money, goods or chattels would not exceed \$500, but the person entitled to full benefit from the issue of the writ of execution, and seizure thereunder, would be deprived of full justice. Again, upon such a construction of the Rules a sheriff would be left in a like position without relief and in peril if he took, or attempted to take, lands or tenements in execution under the writ of execution issued in a County Court. There would be hardship, confusion, delay and expense to everyone concerned in an action commenced in a County Court and the enforcement of a judgment recovered therein, rather than an easy, direct, expeditious and economical means of determining the rights of adverse claimants, as was intended by interpleader proceedings.

Counsel for the appellant refers to and relies on the cases of *Isbister v. Sullivan* (1888), 16 O.R. 418, and *Re Meretsky and Balish* (1923), 53 O.L.R. 605. I think these cases do not support the motion now made. They are not authority upon which I may properly rest my judgment in the matter under the present Rules of Practice. In *Isbister v. Sullivan* the process was issued out of a District Court, possessing by statute the juris-

diction of a County Court. The jurisdiction of the County Court as to the right to goods seized under process was determined, under the provisions of The Interpleader Act, R.S.O. 1877, c. 54, s. 22, then in force, by the fact that the process had issued out of that Court. In *Re Meretsky and Balish* the learned judge held that the statute (of 1881), 44 Vict., c. 7 (Ontario) had given the County Court jurisdiction in certain cases, and that Act "has come forward with a change of guise until we now have Rule 644." With great respect, I cannot agree with that view. The statute of 1881 applied expressly to a claim made "under or by virtue of an execution or of an attachment against an absconding debtor, in the Sheriff's or other official's hands issued out of one of the superior Courts of law." It enabled a judge or other person making an order in the superior court to direct that in certain cases the issue be drawn up and tried in the County Court of the county in which the issue would, under the provisions of s. 22 of The Interpleader Act, *supra*, be tried. It declared that the County Court "shall have jurisdiction in the premises as fully as though the writ of execution or attachment had issued out of a County Court." But, primarily, the function of the legislation was to empower a judge, or other authorized person, in a proceeding in a superior court, to make a special order in certain cases. The jurisdiction of a County Court to make an order upon application by a sheriff was contained in The Interpleader Act, s. 22, *supra*. Rule 644 was in the same form at the time of the judgment in *Re Meretsky and Balish* (1923) as it now is, but that Rule is not a change of guise, and it is not the successor to the statute of 1881, 44 Vict., c. 7, *supra*. Rule 646 occupies that place.

The learned judge rested his judgment on two grounds: (1) that the applicant, the sheriff, was not sued; (2) that there was no debt, money, goods or chattels in question. But, for the reasons I have expressed, I cannot accept the view that an application by a sheriff falls within the provisions of Rule 644(1) (b). Moreover, it does not appear, in that case, that the effect or applicability of subs. 2 of Rule 644 was under consideration, and I think it cannot properly be disregarded. On the contrary, in my opinion it is the source of the sheriff's right to apply, and the power of the County Court to make an order for relief, upon such application being made in an action. Again, at the time of the application by the sheriff in *Re Meretsky and Balish*, the

practice under Rule 10, as it then was, required an application by a sheriff for interpleader relief to be made by originating notice. The Rule in its present form came into force on 1st February 1933 (see [1933] O.R. 851). The Rule, as amended, makes it plain that interpleader proceedings by a sheriff are part of the proceedings "in the original cause or matter". Thus, while The Interpleader Act is superseded by the Rules of Practice, the principle is maintained that, in respect of a claim made to any money, goods or chattels, lands or tenements taken or intended to be taken in execution under a writ of execution issued out of a County Court, or to the proceeds thereof, a sheriff may apply in the County Court for relief by interpleader without regard to the value of the property or proceeds in question.

It follows that this application must be dismissed with costs, including the costs of the sheriff appearing, through counsel, on the motion.

Application dismissed with costs.

Solicitors for the claimant: Luxenberg Levinter Ciglen & Grossberg, Toronto.

Solicitors for the Town of Barrie: Boys & Boys, Barrie.

Solicitor for the sheriff: Donald F. Maclaren, Barrie.

[MACKAY J.]

Re Drummond Wren.

Real Property—Restrictive Covenants—Validity—Restraint against Sale to Jews—Public Policy—Freedom of Alienation—Certainty—The Racial Discrimination Act, 1944 (Ont.), c. 51.

A covenant in a deed of land that the land is "not to be sold to Jews or persons of objectionable nationality" is void and of no effect. Such a covenant is contrary to public policy, in that it tends to create or deepen divisions between religious and ethnic groups, and is in conflict with prevailing public opinion, as exemplified in *The Racial Discrimination Act, 1944*, and other statutes and public documents. *Naylor, Benzon & Co. Limited v. Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331, affirmed [1918] 2 K.B. 486; *Walkerville Brewing Co. Ltd. v. Mayrand* (1929), 63 O.L.R. 573, applied. Further, the covenant is void as a restraint on alienation, not limited as to time. *In re Macleay* (1875), L.R. 20 Eq. 186; *Attwater v. Attwater* (1853), 18 Beav. 330; *In re Rosher*; *Rosher v. Rosher* (1884), 26 Ch. D. 801, considered. Finally, the covenant is void for uncertainty. *Clayton et al. v. Ramsden et al.*, [1943] A.C. 320, applied.

A MOTION for a declaration that a restrictive covenant was invalid.

1st May 1945. The motion was heard by MACKAY J. in chambers at Toronto.

J. R. Cartwright, K.C., and *Irving Himel*, for the applicant.

J. M. Bennett, for the Canadian Jewish Congress.

No one *contra*.

31st October 1945. MACKAY J.:—This is an application brought by Drummond Wren, owner of certain lands registered in the Registry Office for the County of York, to have declared invalid a restrictive covenant assumed by him when he purchased these lands and which he agreed to exact from his assigns, namely,—“Land not to be sold to Jews or persons of objectionable nationality.”

The application is made by way of special leave and pursuant to s. 60 of The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, and Rules 603 and 604 of The Rules of Practice and Procedure.

Under s. 60(1) of The Conveyancing and Law of Property Act, a wide discretion is given to a judge to modify or discharge any condition or covenant “Where there is annexed to any land any condition or covenant that such land or any specified portion thereof is not to be built on or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land.”

Rules 603 and 604 provide respectively that:

"603. (1) Where any person claims to be the owner of land, but does not desire to have his title thereto quieted under *The Quieting Titles Act*, he may have any particular question which would arise upon an application to have his title quieted determined upon an originating notice.

"(2) Notice shall be given to all persons to whom notice would be given under *The Quieting Titles Act*, and the Court shall have the same power finally to dispose of and determine such particular question as it would have under the said Act, but this shall not render it necessary to give the notice required by Rule 705.

"604. Where the rights of any person depend upon the construction of any deed, will or other instrument, he may apply by originating notice, upon notice to all persons concerned, to have his rights declared and determined."

While, pursuant to an order made by me, notice of this application was served upon various persons interested in this and in adjacent lands subject to the same or a similar restrictive covenant, no one appeared in Court upon the return of this motion to oppose it.

The restrictive covenant which is the subject of this proceeding and which by the deed aforesaid the grantee assumes and agrees to exact from his assigns, reads as follows: "Land not to be sold to Jews, or to persons of objectionable nationality." Counsel for the applicant seeks the discharge and removal of this covenant on these alternative grounds: first, that it is void as against public policy; secondly, that it is invalid as a restraint on alienation; thirdly, that it is void for uncertainty; and fourthly, that it contravenes the provisions of *The Racial Discrimination Act, 1944 (Ont.)*, c. 51. The matter before me, so defined, appears to raise issues of first impression, because a search of the case law of Great Britain and of Canada does not reveal any reported decision which would be of direct assistance in this proceeding.

Counsel for the applicant did refer me to three Ontario cases dealing with restrictive covenants similar to that here involved, but, in my view, he rightly took the position that in none of those cases was the Court called upon to pass on the validity of the particular restriction in the way in which I am obliged to do in this case. *Garrow J. in Essex Real Estate Co. Ltd. v.*

Holmes, 37 O.W.N. 392, affirmed 38 O.W.N. 69, did not have to determine the validity of the restriction in that case because he found that the purchaser of the land was not within its terms. Again, in *Re Bryers & Morris*, 40 O.W.N. 572, which was a vendor's and purchaser's motion, Hodgins J.A. refrained from passing on the validity of the restrictive covenant there in question. The third case mentioned by counsel for the applicant is a recent decision of Chevrier J., *Re McDougall and Waddell*, [1945] O.W.N. 272, [1945] 2 D.L.R. 244, which arose out of a vendor's and purchaser's motion for an order that the particular restrictive covenant there objected to offended against the terms of The Racial Discrimination Act, *supra*. The issue raised in that case was a narrow one, and I shall return to a discussion of it later in my judgment.

In this short canvass of the authorities directly applicable, it may not be amiss to point out that, according to an affidavit filed on behalf of the applicant, the present Master of Titles at Toronto has not knowingly permitted anyone to register deeds containing restrictive covenants of a character similar to that in question here, and has on several occasions refused to accept for registration documents containing such covenants, and in no case has an appeal been taken from such refusal.

The applicant's argument is founded on the legal principle, briefly stated in 7 Halsbury, 2nd ed. 1932, pp. 153-4, that: "Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy." Public policy, in the words of Halsbury, "varies from time to time."

In "The Growth of Law", Mr. Justice Cardozo says: "Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the morrow. It must have a principle of growth."

And Mr. Justice Oliver Wendell Holmes, in "The Common Law", says: "The very considerations which judges most rarely mention and always with an apology are the secret root from which the law draws all the juices of life. I mean, of course, what is expedient for the community concerned."

The matter of not creating new heads of public policy has been discussed at some length by McCardie J. in *Naylor, Benson and Co., Limited v. Krainische Industrie Gesellschaft*, [1918]

1 K.B. 331, later affirmed by the Court of Appeal, [1918] 2 K.B. 486. There he points out that "the Courts have not hesitated in the past to apply the doctrine [of public policy] whenever the facts demanded its application." "The truth of the matter," he says, "seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time. This view is exemplified by the decisions which were discussed by the House of Lords in *Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Company, Limited*, [1894] A.C. 535 . . . The principles of public policy remain the same, though the application of them may be applied in novel ways. The ground does not vary. As it was put by Tindal C.J. in *Horner v. Graves* (1831), 7 Bing. 735, 743, 131 E.R. 284. 'Whatever is injurious to the interests of the public is void, on the grounds of public policy.' "

It is a well-recognized rule that courts may look at various Dominion and Provincial Acts and public law as an aid in determining principles relative to public policy: see *Walkerville Brewing Co. Ltd. v. Mayrand*, 63 O.L.R. 573, [1929] 2 D.L.R. 945.

First and of profound significance is the recent San Francisco Charter, to which Canada was a signatory, and which the Dominion Parliament has now ratified. The preamble to this Charter reads in part as follows:

"We, the peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . and for these ends to practice tolerance and live together in peace with one another as good neighbors . . ."

Under articles 1 and 55 of this Charter, Canada is pledged to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

In the Atlantic Charter, to which Canada has subscribed, the principles of freedom from fear and freedom of worship are recognized.

Section 1 of The Racial Discrimination Act, *supra*, provides:

"No person shall,

"(a) publish or display or cause to be published or displayed;

or

"(b) permit to be published or displayed on lands or premises or in a newspaper, through a radio broadcasting station or by means of any other medium which he owns or controls, any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons."

The Provincial Legislature further has expressed itself in The Insurance Act, R.S.O. 1937, c. 256, s. 99, as follows: "Any licensed insurer which discriminates unfairly between risks within Ontario because of the race or religion of the insured shall be guilty of an offence."

Moreover, under s. 6 of the Regulations passed pursuant to The Community Halls Act, now R.S.O. 1937, c. 284, it is provided that "Every hall erected under this Act shall be available for any public gathering of an educational, fraternal, religious or social nature or for the discussion of any public question, and no organization shall be denied the use of the hall for religious, fraternal or political reasons."

Proceeding from the general to the particular, the argument of the applicant is that the impugned covenant is void because it is injurious to the public good. This deduction is grounded on the fact that the covenant against sale to Jews or to persons of objectionable nationality prevents the particular piece of land from ever being acquired by the persons against whom the covenant is aimed, and that this prohibition is without regard to whether the land is put to residential, commercial, industrial or other use. How far this is obnoxious to public policy can only be ascertained by projecting the coverage of the covenant with respect both to the classes of persons whom it may adversely affect, and to the lots or subdivisions of land to which it may be attached. So considered, the consequences of judicial approbation of such a covenant are portentous. If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants, Catholics or other groups or denominations. If the sale of one piece of land can be so prohibited, the sale of other pieces of land can likewise be prohibited. In my

opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or, conversely, would exclude particular groups from particular business or residential areas. The unlikelihood of such a policy as a legislative measure is evident from the contrary intention of the recently-enacted Racial Discrimination Act, and the judicial branch of government must take full cognizance of such factors.

Ontario, and Canada too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.

That the restrictive covenant in this case is directed in the first place against Jews lends poignancy to the matter when one considers that anti-semitism has been a weapon in the hands of our recently-defeated enemies, and the scourge of the world. But this feature of the case does not require innovation in legal principle to strike down the covenant; it merely makes it more appropriate to apply existing principles. If the common law of treason encompasses the stirring up of hatred between different classes of His Majesty's subjects, the common law of public policy is surely adequate to void the restrictive covenant which is here attacked.

My conclusion therefore is that the covenant is void because offensive to the public policy of this jurisdiction. This conclusion is reinforced, if reinforcement is necessary, by the wide official

acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate.

It may not be inexpedient or improper to refer to a few declarations made by outstanding leaders under circumstances that arrest the attention and demand consideration of mankind. I first quote the late President Roosevelt:

"Citizens, regardless of religious allegiance, will share in the sorrow of our Jewish fellow-citizens over the savagery of the Nazis against their helpless victims. The Nazis will not succeed in exterminating their victims any more than they will succeed in enslaving mankind. The American people not only sympathize with all victims of Nazi crimes but will hold the perpetrators of these crimes to strict accountability in a day of reckoning which will surely come.

"I express the confident hope that the Atlantic Charter and the just World Order to be made possible by the triumph of the United Nations will bring the Jews and oppressed people in all lands the four freedoms which Christian and Jewish teachings have largely inspired."

And of the Right Honourable Winston Churchill:

"In the day of victory the Jew's sufferings and his part in the struggle will not be forgotten. Once again, at the appointed time, he will see vindicated those principles of righteousness which it was the glory of his fathers to proclaim to the world. Once again it will be shown that, though the mills of God grind slowly, yet they grind exceeding small."

And of General Charles de Gaulle:

"Be assured that since we have repudiated everything that has falsely been done in the name of France after June 23rd, the cruel decrees directed against French Jews can and will have no validity in Free France. These measures are not less a blow against the honour of France than they are an injustice against her Jewish citizens.

"When we shall have achieved victory, not only will the wrongs done in France itself be righted, but France will once again resume her traditional place as a protagonist of freedom and justice for all men, irrespective of race or religion, in a new Europe."

Also, the resolution passed by the representatives of over sixty million organized workers at the World Trade Union Con-

gress recently held at London that "every form of political, economic or social discrimination based on race, creed or sex, shall be eliminated."

The resolution against discrimination adopted unanimously by the Latin American nations and the United States in Mexico City on 6th March 1945, at the time of the Act of Chapultepec, is that the governments of these nations shall "prevent with all the means in their power all that may provoke discrimination among individuals because of racial and religious reasons."

It is provided in art. 123 of The Constitution of the Union of Soviet Socialist Republics, that:

"Equality of rights of citizens of the U.S.S.R., irrespective of their nationality or race, in all spheres of economic, state, cultural, social and political life, is an indefeasible law.

"Any direct or indirect restriction of the rights of, or, conversely, any establishment of direct or indirect privileges for, citizens on account of their race or nationality, as well as any advocacy of racial or national exclusiveness or hatred and contempt, is punishable by law."

The second point raised by counsel for the applicant is that the covenant is invalid as a restraint on alienation. It is unnecessary to quote authorities in support of the long-established principle of the common law that land should be freely alienable. True, a limited class of exceptions to this general principle has from time to time been recognized, as in *In re Macleay* (1875), L.R. 20 Eq. 186, though it may be pointed out that this decision runs counter to the earlier case of *Attwater v. Attwater* (1853), 18 Beav. 330, 52 E.R. 131. Moreover, in *In re Rosher; Rosher v. Rosher* (1884), 26 Ch. D. 801, Pearson J. stated that he failed to appreciate how the exception recognized in *In re Macleay* arose. It is not necessary to challenge the doctrine of *In re Macleay*, which has been followed in some Canadian cases, in order to find that the covenant with which I am concerned is invalid as a restraint on alienation. The particular covenant in the case before me is not limited either in time or to the life of the immediate grantee (see Sweet, Restraints on Alienation, 33 L.Q.R. 236, 342, particularly at p. 354), which would seem to be characteristic of the partial restraints which were enforced in the decided cases that I have been able to find. The principle of freedom of alienation has been too long and two well established in the jurisprudence of English and Canadian courts

to warrant me at this late stage in recognizing a limitation upon it of a character not hitherto the subject of any reported case, especially in view of my conclusions as to public policy.

Counsel for the applicant contended before me that the restrictive covenant here in question is void for uncertainty. So far as the words "persons of objectionable nationality" are concerned, the contention admits of no contradiction. The conveyancer who used these words surely must have realized, if he had given the matter any thought, that no court could conceivably find legal meaning in such vagueness. So far as the first branch of the covenant is concerned, that prohibiting the sale of the land to "Jews", I am bound by the recent decision of the House of Lords in *Clayton et al. v. Ramsden et al.*, [1943] A.C. 320, [1943] 1 All E.R. 16, to hold that the covenant is in this respect also void for uncertainty; and I may add, that I would so hold even if the matter were *res integra*. The law lords in *Clayton v. Ramsden* were unanimous in holding that the phrase "of Jewish parentage" was uncertain, and Lord Romer was of the same opinion with regard to the phrase "of the Jewish faith". I do not see that the bare term "Jews" admits of any more certainty.

I should like, in conclusion, to refer to the judgment of Chevrier J. in *Re McDougall and Waddell, supra*. The learned judge there decided that the registration of a deed containing a covenant restricting the sale or user of land to "Gentiles (non-semetic [*sic*]) of European or British or Irish or Scottish racial origin" did not constitute an infringement of The Racial Discrimination Act. He came to this conclusion by holding that registration of a deed was not among the proscribed means of publishing or displaying enumerated in s. 1 of the Act. Counsel for the applicant herein contended that these proscribed means related only to the terms of clause (b) of s. 1, and that they did not qualify clause (a) of s. 1, which reads as follows:

"No person shall,—(a) publish or display or cause to be published or displayed . . . any notice, sign, symbol, emblem, or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons."

Mr. Cartwright further submitted that if this section had been read by the learned judge without this limitation, registra-

tion in the Registry Office constituted publication of a notice or other representation as aforesaid, and that following 29 Halsbury, 2nd ed. 1938, p. 444, "registration constitutes actual notice to all the world", therefore he should have found that the particular clause was in breach of the said Act.

I do not deem it necessary for the purpose of this case to deal with this argument, except to say that it appears to me to have considerable merit. My opinion as to the public policy applicable to this case in no way depends on the terms of The Racial Discrimination Act, save to the extent that such Act constitutes a legislative recognition of the policy which I have applied; in fact my brother Chevrier, as I read his judgment in *Re McDougall and Waddell*, is in accord with me in this respect.

An order will therefore go declaring that the restrictive covenant attacked by the applicant is void and of no effect.

Order accordingly.

Solicitor for the applicant: Irving Himel, Toronto.

[COURT OF APPEAL.]

Re MacKenzie.

Criminal Law—"Preventive" Jurisdiction of Justices—Anticipated Breach of Peace—Proper Procedure—The Criminal Code, R.S.C. 1927, c. 36, ss. 748(2), 1058—The Justices of the Peace Act, R.S.O. 1937, c. 132, s. 14—The Magistrates Act, R.S.O. 1937, c. 133.

Habeas Corpus—Right of Appeal—Whether Original Proceedings Civil or Criminal—"Preventive" Jurisdiction—The Habeas Corpus Act, R.S.O. 1937, c. 129, s. 8.

If justices of the peace in Ontario possess jurisdiction, apart from s. 748(2) of The Criminal Code, to administer what is known in England as "preventive justice", i.e., to require the giving of security to keep the peace by persons who have committed no offence, but whose conduct gives rise to an apprehension of a breach of the peace on their part, that jurisdiction is civil in its nature rather than criminal, and s. 8 of the Ontario Habeas Corpus Act accordingly gives a right of appeal from the refusal of a judge, on *habeas corpus*, to order the discharge of a person imprisoned in purported exercise of this jurisdiction.

Quaere, whether such jurisdiction exists at all in Ontario, apart from the provisions of The Criminal Code.

Where a justice, in purported exercise of this "preventive" jurisdiction, orders a person to find sureties, and, in default, to be imprisoned, it is essential that, if the person is in fact imprisoned, both the order for imprisonment and the warrant of commitment should contain an express statement that he has neglected or refused to find the sureties. It is also essential, where apprehension of a breach of the peace is alleged as the ground for exercising jurisdiction, that there should be evidence from which such an apprehension may be found.

Semble, s. 8 of the Ontario Habeas Corpus Act is not effective to give a right of appeal from the decision of a judge on *habeas corpus* where the applicant for the writ is detained by virtue of a conviction under The Criminal Code. *In re Storgoff*, [1945] S.C.R. 526, applied. Judgment of Hogg J., *ante*, p. 569, reversed.

AN APPEAL by Alexander C. MacKenzie from the order of Hogg J., *ante*, p. 569, 84 C.C.C. 317, refusing to discharge the appellant from custody upon the return of a writ of *habeas corpus*.

13th and 14th September 1945. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and ROACH JJ.A.

T. Delany, for the applicant, appellant: There is no such offence as that stated in the conviction, either under The Criminal Code, R.S.C. 1927, c. 36, or at common law. Section 748(2) enables a justice to bind over, but does not apply here, and s. 1058 is also inapplicable. [ROBERTSON C.J.O.: It may be important to note that s. 1058 authorizes a recognizance for two years only, and provides that imprisonment is to be for a definite term, or until a recognizance is entered into or security is given, which is very different from the order made in this case.]

The appellant's conduct was at most a tort, in the nature of a private nuisance, and possibly enjoined by injunction: *Rex ex rel. Allen et al. v. Lloyd* (1802), 4 Esp. 200, 170 E.R. 691. [ROBERTSON C.J.O.: It was clearly not a criminal nuisance within the definitions in ss. 221 to 223 of the Code, and in any case the appellant was not charged with committing a nuisance.] *Phillips v. Justices of Gateshead* (1879), 67 L.T. Jo. 204, shows that there is no way of preventing personal insults not amounting to assault.

The "preventive" jurisdiction of justices in England is discussed in articles, "Recognizance for Good Behaviour" (1895-6), 59 J.P. 818; 60 J.P. 2, and also in Burn's Justice of the Peace, 30th ed. 1869. [ROBERTSON C.J.O.: Can this be called an exercise of "preventive" jurisdiction, where the magistrate made a formal conviction?]

Rex v. Patterson, 66 O.L.R. 461, 55 C.C.C. 218, [1931] 3 D.L.R. 267, referred to by the trial judge, was an appeal from a conviction under the Code, and there was therefore power to bind over under s. 1058. [ROBERTSON C.J.O.: Much of what was said in that case was *obiter*.] *Rex v. Sandbach; Ex parte Williams*, [1935] 2 K.B. 192, was also a conviction, followed by a penalty and an order for a recognizance.

W. B. Common, K.C., for the informant, respondent: There is no right of appeal in this case: *In re Storgoff*, [1945] S.C.R. 526, 84 C.C.C. 1, [1945] 3 D.L.R. 673 (*sub nom. Rex v. Storgoff*), shows that a Provincial statute cannot give a right of appeal in *habeas corpus* proceedings in a criminal matter. The whole proceedings herein, having been taken under The Habeas Corpus Act, R.S.O. 1937, c. 129, are abortive. They should have been taken, if at all, under the Act 31 Car. II, c. 2, and there is no right of appeal under that Act. The pre-confederation statute of Canada, 1866, c. 45, did not provide for an appeal in proceedings under the Act of Charles II.

The magistrate did not in fact "convict" this appellant, but merely ordered him to find sureties, exercising jurisdiction under the common law rather than under the Code—this is shown by his statement to the appellant in the depositions. If subsequently he or his clerk filled out inappropriate forms, or used improper terms, that cannot vitiate his proceedings. [ROBERTSON C.J.O.: He opened the proceedings by taking an election and a plea of not guilty, and signed a formal conviction.] The proceedings were taken at common law, and not under any provision of the Code. The information is regular on its face, and alleges an occurrence which comes within the "preventive" jurisdiction of justices. Reading this to the accused is the only possible beginning of the proceedings. No election appears in the depositions, although one is recited in the formal "conviction". The magistrate made a judicial determination, and, according to the depositions, did not make any conviction, but merely required the appellant to find sureties. [ROBERTSON C.J.O.: If there had been a charge of theft, and the magistrate had said "We can't have this kind of thing; you will go to gaol", and had then signed a formal conviction, would you have said that there had been no conviction?] We are not proceeding under the Code, and there is no analogy. In fact and in law there has been no conviction. The formal document is made on the ordinary form for a conviction, and the warrant of commitment follows its language. These two documents contain defects in form, but not in substance, and a very slight change in form would make them comply with the true facts. [ROBERTSON C.J.O.: You say that that is all the magistrate intended to do, but it is quite possible that he intended to do precisely what the documents say he did do.] The evidence shows that the appellant was making a great nuisance of himself.

The whole subject of "preventive" jurisdiction is discussed in an article, "Recognizances for Good Behaviour" (1940), in 4 Journal of Criminal Law, p. 151. This article shows that this jurisdiction is very old, and antedates the statute 34 Ed. III (1360), c. 1. [ROBERTSON C.J.O.: Is there any limit to the term of the recognizance which he can require?] I think not, at common law. [ROBERTSON C.J.O.: Where does this particular magistrate get this jurisdiction? A Provincial commission could not confer it on him.] The common law of England is in force here, except as abrogated by The Criminal Code. Since a justice has this power in England, a justice appointed under a commission here would have it too.

[ROBERTSON C.J.O.: Was this a criminal proceeding? *Bédard v. Dawson and The Attorney-General of Quebec*, [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 412, shows that "preventive justice" is within the Provincial field.] That was a different case: see per Rinfret C.J.C. in *In re Storgoff*, *supra*, quoting from Duff C.J.C. in *In re McNutt* (1912), 47 S.C.R. 259, 10 D.L.R. 834, 21 C.C.C. 157, 13 E.L.R. 109, also *In re Authority to Perform Functions under The Children's Protection Act, etc.*, [1938] S.C.R. 398, [1938] 3 D.L.R. 497. The jurisdiction having been treated in England as a criminal one, it should be so treated here.

T. Delany, in reply: The quotation from Blackstone's Commentaries in *Rex v. Sandbach; Ex parte Williams*, *supra*, at p. 197, shows that a breach of the peace must be apprehended from the person bound over, not from others. The facts of that case come exactly within s. 1058 of the Code.

The common law jurisdiction was founded upon the justice's commission, and upon the statute of Edward III. There is no such commission here. The form of the English commission is set out in Burn, *op. cit.*, vol. III, pp. 111-113; see also *Reg. v. The Justices of Londonderry* (1891), 28 L.R. Ir. 440 at 446.

The Canadian Act of 1866, by s. 5, clearly extends to more than civil cases. The fact that the present Act is named in the style of cause of these proceedings is immaterial, because they are also styled "In the Matter of" the appellant. Technicalities should not prevent a determination of the right of liberty of the subject: *Cox v. Hakes* (1890), 15 App. Cas. 506.

In re Storgoff, *supra*, is distinguishable. There the applicant for discharge had been charged under The Criminal Code, and

the British Columbia statute there under consideration did not antedate Confederation. Also, the special provision there considered was one for an appeal by the Crown after an order for discharge had been made, and for the re-arrest of accused.

No crime has been committed here, and the proceedings before the magistrate were not criminal: *In re Dean* (1913), 48 S.C.R. 235, 9 D.L.R. 364, 20 C.C.C. 374, 3 W.W.R. 1037.

Cur. adv. vult.

9th November 1945. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal by Alexander C. MacKenzie from the order of Mr. Justice Hogg, dated 4th July 1945, made upon the return of a writ of *habeas corpus*, dismissing the appellant's motion for his discharge, and remanding him to custody under the original warrant of commitment.

On the 29th March 1945 an information and complaint was laid by one Martindale, a detective, against the appellant, alleging that in the months of February and March 1945, at the village of Swansea and city of Toronto, in the county of York, the appellant "did unlawfully repeatedly call on the telephone Mrs. Martha MacKenzie, Miss Elsie T. Hodgson, and Creed's Furs Limited, thereby causing the said parties and employees of Creed's Furs Limited, annoyance, loss of sleep, inconvenience and worry, said acts tending towards a breach of the public peace", wherefore the complainant desired that the appellant should be brought before a Court of summary jurisdiction, and that an order should be granted against him, directing him to find one or more sureties who would be answerable for his good behaviour during such period of time as might seem to the Court just, in accordance with the law. The complainant prayed that a summons might issue and justice be done in the premises.

On the 5th April 1945 the appellant appeared without counsel before O. M. Martin, magistrate in and for the county of York. On that day certain proceedings were had and evidence taken, and the magistrate signed a document headed "Conviction upon a plea of not guilty", reading as follows:

"CANADA, PROVINCE OF ONTARIO, COUNTY OF YORK TO WIT:	{ BE IT REMEMBERED that on the fifth day of April, in the year of our Lord one thousand nine hundred and forty-five,
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at the City of Toronto, in the said County of York, Alexander C. MacKenzie, being charged before me the undersigned, O. M. Martin, Esquire, Magistrate in and for the said County of York (and consenting to my trying the charge summarily) is convicted before me that he, the said Alexander MacKenzie in the months of February and March, in the year of our Lord One thousand nine hundred and forty-five did in the said County of York (Village of Swansea and City of Toronto) unlawfully repeatedly call on the telephone Mrs. Martha MacKenzie, Miss Elsie T. Hodgson, and Creed's Furs Limited, thereby causing the said parties and employees of Creed's Furs Limited, annoyance, loss of sleep, inconvenience and worry, said acts tending towards a breach of the public peace, wherefore the complainant desires that the said Alexander MacKenzie should be brought before a court of summary jurisdiction and that an order should be granted against the said Alexander MacKenzie directing him to find one or more sureties who will be answerable for his good behaviour during such period of time as may seem to the Court just, in accordance with the law, contrary to The Common Law of England. And I adjudge the said Alexander MacKenzie for his said offence, to find two (2) persons to go security for his good behaviour in the sum of \$1,000.00 each for a period of three (3) years, and failing to find two (2) persons to go security for his good behaviour, I adjudge the said Alexander MacKenzie to be imprisoned in the Common Gaol in and for the said County of York (and there to be kept to hard labour) for the term of Six (6) months.

"GIVEN under my hand and seal, the day and year first above mentioned, at the City of Toronto, aforesaid.

"O. M. MARTIN",

"Magistrate."

On the same day, 5th April 1945, the magistrate issued a warrant of commitment to the Governor of the Toronto Gaol, commanding him to receive the appellant into custody, and to imprison him and keep him at hard labour for the term of six months, in default of carrying out the above-mentioned order. Upon this warrant the appellant was taken into custody, and held in prison. Later a writ of *habeas corpus* was issued, with a writ of *certiorari* in aid, and the motion was made, which was disposed of by the order of Mr. Justice Hogg now appealed from.

Objection was taken on behalf of the Crown that there is no right of appeal to this Court from the order of Mr. Justice

Hogg, and the recent decision of the Supreme Court of Canada in *In re Storgoff*, [1945] S.C.R. 526, 84 C.C.C. 1, [1945] 3 D.L.R. 673 (*sub nom. Rex v. Storgoff*) was cited. In that case it was held that the provision of s. 6 of The Court of Appeal Act of British Columbia (R.S.B.C. 1936, c. 57), granting a right of appeal to the Court of Appeal in a *habeas corpus* matter is inoperative if the applicant for the writ is detained in custody by virtue of a conviction for a criminal offence under The Criminal Code, R.S.C. 1927, c. 36. It was held that as the power to legislate in relation to the criminal law is assigned to the Dominion Parliament by s. 91(27) of The British North America Act, a Provincial Legislature cannot authorize an appeal in such a case from an order dismissing the applicant's motion for discharge, and remanding him to custody. Whether a proceeding by *habeas corpus* is civil or criminal in its nature was held to depend upon the character of the matter, whether civil or criminal, in which relief by way of *habeas corpus* is sought, and the decision of the House of Lords in *Amand v. Home Secretary et al.*, [1943] A.C. 147, [1942] 2 All E.R. 381, was referred to.

The writ of *habeas corpus* in the present case was applied for under a statute of the Province of Ontario, The Habeas Corpus Act, R.S.O. 1937, c. 129, and s. 8 of that statute was relied upon as giving the right of appeal. That statute, unlike the British Columbia statute in question in the *Storgoff* case, is of pre-confederation origin, having been first enacted, although in somewhat different terms, in 1866, as 29-30 Vict., c. 45. Section 6 of that statute provided for an appeal. Whether or not that statute, as originally passed, applied at all to criminal, as well as to civil, proceedings is a question that has, perhaps, never been finally determined: see *Reg. v. St. Clair* (1900), 27 O.A.R. 308, 3 C.C.C. 551 per Osler J.A., at p. 310, and cases there cited. No doubt, there have been cases since in which it has been assumed that this statute, as now altered and incorporated in the Revised Statutes of Ontario, may be applied in criminal as well as in civil cases—e.g., *Rex v. Martin* (1927), 60 O.L.R. 577, 48 C.C.C. 23, [1927] 3 D.L.R. 1134; and see *Rex v. Page* (1922), 53 O.L.R. 70, 41 C.C.C. 59, [1923] 3 D.L.R. 854—but I have not found a case where the question propounded by the late Mr. Justice Osler in the *St. Clair* case has been considered and definitely decided. But even if it were definitely concluded that, in its general scope, the present statute of this Province—upon

which the appellant relies—may be considered to extend to criminal cases by reason of its pre-confederation origin, a further question arises whether the right of appeal from a single judge, now given by s. 8, can be held to extend to a case where the applicant is detained by virtue of a conviction for a criminal offence under The Criminal Code. The original statute gave no right of appeal from a single judge, but only from the Court in term. The decision of the Court of Appeal in the case of *In re Boucher* (1879), 4 O.A.R. 191, was that no appeal lay from a single judge to that Court. There was, in that case, an appeal from a decision of a single judge who had remanded the appellant to custody. It was pointed out by Moss C.J.A. that what was enacted by the statute 29-30 Vict., c. 45, passed by the Parliament of the former Province of Canada in 1866, was that in case any person confined or restrained of his liberty be brought before the Court *in term time* upon a writ of *habeas corpus* and is remanded, such person may appeal from the decision or judgment of the said Court to the Court of Appeal. The learned Chief Justice pointed out that the prisoner, who had been convicted by a magistrate of unlawfully and maliciously wounding a woman with intent to do her grievous bodily harm, was not brought before the Court *in term time*, and that that was the only case with which the enactment dealt in granting a right of appeal. He held that later alterations in the practice made by the Provincial Legislature (see 37 Vict., c. 7, s. 17), whereby the business formerly dealt with by the Court in term might be dealt with by a single judge, dealt only with civil controversies, over which the Province alone had jurisdiction, and that to extend them to the case then in hand would be to alter criminal procedure, over which the Provincial Legislature had no jurisdiction. Section 8 of the present statute, upon which the appellant relies for his right of appeal from a single judge, would appear to be in the same position as the provision of the British Columbia statute under consideration in the *Storgoff* case. It becomes necessary, therefore, to enquire whether the proceeding, by which the appellant was deprived of his liberty, was civil or criminal in its nature. That is not the absolutely correct way to put the question, for, under s. 92(15) of The British North America Act, there is a very limited jurisdiction in the Province to legislate in relation to criminal law, and a matter

may be criminal in its nature and yet fall within the class of cases within Provincial jurisdiction, and, therefore, for the present purpose, in the same category as cases civil in their nature. With that understood, I shall speak of the two classifications, civil and criminal, as covering respectively the matters that fall within Provincial jurisdiction, and the matters that, as criminal law, fall within Dominion jurisdiction.

It is conceded by counsel for the Crown that the evidence taken before the magistrate disclosed no criminal offence on the part of the appellant. He further conceded that the appellant was not even charged with the commission of a crime. His contention was that the proceeding called for the application of what has been called "preventive justice", in respect of which he contended that the magistrate has a common law jurisdiction.

In *Rex v. Halliday*, [1917] A.C. 260 at 273, Lord Atkinson said: "Preventive justice, as it is styled, which consists in restraining a man from committing a crime he may commit but has not yet committed, or doing some act injurious to members of the community which he may do but has not yet done, is no new thing in the laws of England." Blackstone, in his Commentaries, Book IV, c. 18, headed "Of the Means of Preventing Offences", says: "This preventive justice consists in obliging those persons whom there is a probable ground to suspect of future misbehaviour to stipulate with and to give full assurance to the public that such offence as is apprehended shall not happen, by finding pledges or securities for keeping the peace, or for their good behaviour." The subject is discussed at length in the judgments in the case of *Lansbury v. Riley*, [1914] 3 K.B. 229. There are many cases to be found in the reports, of the exercise of this jurisdiction, although I cannot find that it has had any prominent place in the Canadian reports. Middleton J.A. in the course of his judgment in *Rex v. Patterson*, 66 O.L.R. 461, 55 C.C.C. 218, [1931] 3 D.L.R. 267, cites the *Lansbury* case, and quotes from it. Hogg J. refers to the judgment in the *Patterson* case as an authority on the subject of "preventive justice". The *Patterson* case was, however, an appeal from conviction of an offence under The Criminal Code, and the reference of Middleton J.A. to the *Lansbury* case was made in the course of a discussion of what constituted an unlawful assembly.

There may be some difficulty in ascribing to a magistrate or a justice of the peace in Ontario jurisdiction to administer, as part of the common law, what is called "preventive justice", but I shall put to one side, for the moment, any question of that kind, and shall assume that the magistrate here was possessed of the necessary jurisdiction, and, further, that he intended that what he did was to be understood as counsel for the Crown contends. Was the proceeding, as so understood, a civil or a criminal proceeding?

We have the express admission of counsel for the respondent that there was no crime on the part of the appellant, either charged or proved. He was charged with conduct that, it was alleged, tended towards a breach of the public peace, but, as admitted by counsel for the respondent, his conduct did not amount to a breach of the peace. To restrain the liberty of a subject where there has been no crime committed is, beyond question, an interference with a civil right, and it would seem equally clear that the law that warrants it cannot be criminal law in the proper sense. Lord Atkin said in *Proprietary Articles Trade Association v. Attorney-General for Canada et al.*, [1931] A.C. 310, at p. 324, [1931] 2 D.L.R. 1, 55 C.C.C. 241, [1931] 1 W.W.R. 552, "Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State." This proceeding is taken to prevent an offence, and not to punish for an offence committed. That the Province may legislate upon such a matter is illustrated by the case of *Bédard v. Dawson and The Attorney General of Quebec*, [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 412. In that case a statute of the Province of Quebec which authorized an order to be made closing premises with a view to preventing the committing therein of offences against The Criminal Code, which previous conduct indicated as probable, was held to be valid. It was said in that case by Duff J. (afterwards Chief Justice): "The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate."

In England, where the jurisdiction of the justices of the peace in the matter of "preventive justice" developed, their functions were, in the beginning, those of conservators of the peace,

and it was only later that they were invested with authority to try offences: Paley on Summary Convictions, 9th ed. 1926, p. 2, and Burn's Justice of the Peace, 30th ed. 1869, vol. III, pp. 108-110. Duff C.J., delivering the judgment of the Court in a *Reference re Authority to Perform Functions under The Children's Protection Act, etc.*, [1938] S.C.R. 398, [1938] 3 D.L.R. 497, said, at p. 403:

"Moreover, while, as subject matter of legislation, the criminal law is entrusted to the Dominion Parliament, responsibility for the administration of justice and, broadly speaking, for the policing of the country, the execution of the criminal law, the suppression of crime and disorder, has from the beginning of Confederation been recognized as the responsibility of the provinces and has been discharged at great cost to the people; so also, the provinces, sometimes acting directly, sometimes through the municipalities, have assumed responsibility for controlling social conditions having a tendency to encourage vice and crime."

I refer also to what is said by Humphreys J. in *Rex v. Sandbach; Ex parte Williams*, [1935] 2 K.B. 192 at 197. There had been a conviction in that case for obstructing the police, and the magistrate had made an order requiring the applicant to enter into a recognizance with sureties for his good behaviour. The jurisdiction of the magistrate to make that order was in question. Humphreys J. quoted from Blackstone, where it is said, "... it is holden that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem*." The learned judge proceeded, "I cannot think that the expression against the peace or apprehension of a breach of the peace is confined to a breach or apprehension of a breach of that part of the law which provides that persons shall not commit assaults, and I think that the distinction which is there drawn by Blackstone is the distinction between such matters as are contrary to morality (*contra bonos mores*) and such matters as are contrary to law (*contra pacem*)."

Having in mind, therefore, the nature of the jurisdiction conferred upon a magistrate by the common law, to administer "preventive justice" by requiring security for good behaviour in certain circumstances, and having in mind also the powers and obligations of the Provinces as stated by Duff C.J. in the judgment from which I have quoted, I am of the opinion that the proceeding against the appellant before the magistrate was

a civil proceeding, and, being of that nature, the provisions of The Habeas Corpus Act, R.S.O. 1937, c. 129, apply and give the appellant a right of appeal to this Court.

I have not overlooked the provision of subs. 2 of s. 748 of The Criminal Code. It provides that "Upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he, the complainant, is afraid that such other person will do him, his wife or child some personal injury, or will burn or set fire to his property, the justice before whom such complaint is made, may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizance, or to give security, to keep the peace, and to be of good behaviour, for a term not exceeding twelve months." That provision, of course, does not cover such a case as the present. It is, however, a provision for exercising what properly may be called "preventive justice", rather than for the punishment of crime actually committed. In fact it has been suggested that the making of this provision may, impliedly, limit the common law rule, upon which the respondent here relies, to the cases expressly provided for by this subsection—see Tremear's Criminal Code, 5th ed. 1944, at p. 911. I do not think it necessary, however, that I should here deal with any questions that arise from the presence of s. 748(2) in The Criminal Code. So far as I can discover they have not been dealt with judicially.

Section 1058 of The Criminal Code makes provision, where a person is convicted of an offence, for requiring him to enter into recognizances, or to give security to keep the peace and to be of good behaviour, for any term not exceeding two years. There the requirement of security is by way of punishment for an offence actually committed, and there was, admittedly, no conviction for any offence here. It may be noted that the time for which a person may be required to be bound over under s. 748(2) is limited to twelve months, and under s. 1058, where there has been a conviction, the time is limited to two years. In this case, where there had been no offence committed, the appellant was ordered to find sureties for a period of three years.

Having reached the conclusion that the proceeding before the magistrate was civil rather than criminal in its character, and that the Ontario Habeas Corpus Act applies to the present

appeal, the affidavits, depositions, evidence and other proceedings are before us, and, under s. 8, we are to determine whether the confinement or restraint of the appellant is illegal.

The warrant for appellant's detention issued by the magistrate, and the so-called conviction, are both before us. It is not stated in either of them that the appellant had neglected or refused to find the required sureties, or that he was in default in that regard. Both documents are expressed in terms that state the subject matter of the information laid as an offence committed, and a judgment of imprisonment for such offence, pronounced upon conviction thereof, in default of finding sureties as ordered. In documents that should be formally correct, as well as accurate in substance, these errors, on their face, are enough to invalidate them. The omission of any statement either in the formal conviction or in the warrant, that the appellant had made default in finding sureties, as required, is the omission to state the only matter that in law would warrant his imprisonment. In a civil matter, if the prisoner is detained under process, illegality or irregularity in his original caption affords ground for his discharge: *Re Eggington* (1853), 2 E. & B. 717, 118 E.R. 936; *Rex v. Whitesides* (1904), 8 O.L.R. 622, 8 C.C.C. 478; and see *Re Doe* (1893), 2 Que. Q.B. 600, 3 C.C.C. 370, and form No. 50 in The Criminal Code. Upon this ground alone the appellant was, in my opinion, entitled to be discharged.

So far as the evidence is concerned, much of it was not properly admissible, being either mere hearsay, or of matters not brought home to the appellant. The counsel for the prosecution laboured to extract evidence of some apprehension, on the part of the persons concerned, of a breach of the peace, arising from appellant's telephoning, but with small result. It is of some possible significance that the charge was not laid by any of the parties concerned. It would seem plain that unless there was some evidence to show that the conduct complained of tended towards a breach of the peace, as alleged, there was no evidence to support the magistrate's order. The constant calls on the telephone, while no doubt a nuisance, as one of the witnesses stated, could have been dealt with effectively by other means, and did not in themselves constitute, nor was it charged that they did in themselves afford, ground for binding appellant over. The appellant is possessed of property of substantial value. He owned the house in which he lived, and from which he did his

telephoning, and he could be made civilly responsible for his trespasses. He is a blind man and lives in a suburban town some miles from the places to which it is alleged he telephoned. How a breach of the peace on his part could reasonably be apprehended as an outcome of his telephoning, it is not easy to see. In fact the magistrate seems not to have concerned himself with that essential aspect of the matter before him, for he said nothing about it. In passing judgment he said: "We certainly cannot have this kind of thing going on in our city, calling people on the telephone and annoying them so much, so you are ordered, Mr. MacKenzie, to find two sureties in the sum of \$1,000 each who will be answerable for your good behaviour for three years; in default of this you will be committed to gaol for six months." In my opinion the evidence does not warrant the conclusion that the conduct alleged in the information tended towards a breach of the peace, and I do not think the magistrate reached any such conclusion. Upon this ground also the appellant should be discharged.

The question that was raised of the magistrate's jurisdiction to administer what is termed "preventive justice" is not a simple one. There is some discussion in the cases in England of the source of the justices' jurisdiction in that regard, and it is referred to in such works as Blackstone's Commentaries and Burn's "Justice of the Peace". It would appear that in England one of the sources, if not the only source, of the jurisdiction in this regard vested in the justices of the peace is the commission in which their duties and powers are set forth at considerable length. A form of commission appears in Burn, *op. cit.*, vol. III, pp. 111-113. The issue of a commission containing appropriate authority seems to be regarded in England as essential to vest this special jurisdiction in the justices of the peace. Nowhere have I found it stated that, at common law, independently of such a commission, a justice of the peace possesses that jurisdiction. We have no practice in this Province, as I am informed, of issuing a similar commission to justices of the peace, or to magistrates. A patent issues which contains no more than the bare appointment. The patent is issued on the authority of the Lieutenant-Governor in Council, as provided by The Justices of the Peace Act, R.S.O. 1937, c. 132 (in the case of magistrates, The Magistrates Act, R.S.O. 1937, c. 133). These Acts have little to say in respect of the powers of a justice of the peace or

of a magistrate. In the first-mentioned Act, s. 14 (enacted in 1936) deals with the powers of a justice of the peace, but contains nothing that can be related to such a jurisdiction as we are concerned with here. A magistrate has the powers of two justices of the peace, and the Lieutenant-Governor in Council may make regulations, among other purposes, for "prescribing the powers, duties and office hours of magistrates".

There are numerous provisions to be found in The Criminal Code that delegate to the magistrates or to justices of the peace authority in respect of matters that the Code deals with, but the Code does not deal with the subject we are concerned with here, except in so far as s. 748(2) may do so.

Holding the opinion I have stated as to the invalidity of the proceedings, it is not necessary, for the purpose of disposing of this appeal, to pursue further the question of the magistrate's jurisdiction. It was referred to upon the argument, and was discussed somewhat. The question is one that would require much careful investigation, and a fuller discussion than I should enter upon here, and I, therefore, express no conclusion upon it.

I would allow the appeal, on the grounds I have already stated, and order the discharge of the appellant.

Appeal allowed.

Solicitor for the applicant, appellant: Thomas Delany, Toronto.

Solicitor for the Crown, respondent: C. L. Snyder, Toronto.

[COURT OF APPEAL.]

Summers v. The Niagara Parks Commission and Niagara-on-the-Lake Golf Club Limited.

Crown—Immunity from Actions in Tort—Agency of Crown—Niagara Parks Commission—The Niagara Parks Act, R.S.O. 1937, c. 93.

Negligence—Dangerous Premises—Invitation or Licence—Necessity for Control and Occupation by Defendant—Res ipsa loquitur—Basis of Application of Rule.

The plaintiff, a playing member of the defendant Club, was injured while playing on the course, in the vicinity of a very old and disused building. A tract of land, including the golf course and the old building, was leased by the defendant Commission from the Crown, subject to a prior lease of the golf course to the Club. The plaintiff sued for damages, alleging that his injury was caused by the fall of a brick from an overhanging part of the wall of the building.

Held, the action must fail as against both defendants, even if it were found that the plaintiff's injuries had been caused as alleged. As to the Commission, it was clearly in occupation of the lands only as an agent of the Crown in right of the Province, and as such it could not be sued in tort. Further, it did not clearly appear that at the time of the accident the plaintiff was on premises occupied by the Commission, and, since his action was based upon invitation or licence, express or implied, it was essential for him to establish control or occupation by the defendant. As to the Club, the plaintiff had not established negligence by affirmative evidence, and the circumstances were not such as to entitle him to rely on the rule *res ipsa loquitur*, since he had not shown that the building from which the brick was said to have fallen was under the management or control of this defendant. *Scott v. The London and St. Katherine Docks Company* (1865), 3 H. & C. 596 at 601, quoted and applied.

Judgment of Hope J., *ante*, p. 326, affirmed.

AN APPEAL by the plaintiff from the judgment of Hope J., *ante*, p. 326, [1945] 2 D.L.R. 689, dismissing the action.

22nd October 1945. The appeal was heard by HENDERSON, LAIDLAW and ROACH JJ.A.

J. L. G. Keogh, for the plaintiff, appellant: This is a case where, under the authorities, the rule *res ipsa loquitur* should be applied: *Kearney v. London, Brighton, and South Coast Railway Company* (1871), L.R. 6 Q.B. 759; *Roberts v. Mitchell* (1894), 21 O.A.R. 433 at 436, 440. These cases refer to something overhanging a highway, but the principle has been extended by modern English decisions to any overhanging object anywhere. The Commission, as tenant of the fort, owed a duty to the plaintiff as a licensee, or to any other person lawfully in the neighbourhood, independent of actual knowledge by it, to take reasonable precautions to make the premises safe, and the onus is on it to show that it did so. My submission is that both defendants occupied and used the building. [HENDERSON J.A.: Do you accept the trial judge's finding that you were only

a licensee *qua* the Commission?] Yes. I rely on *Cunard et ux. v. Antifyre Limited*, [1933] 1 K.B. 551, and *Taylor et al. v. Liverpool Corporation*, [1939] 3 All E.R. 329 at 337. [LAIDLAW J.A.: Surely the duty to a licensee is only as to danger of which the occupant actually knows, whereas that to invitees extends also to dangers of which he ought to have known?] The limitation to actual knowledge is only in the case of trespassers: *Robert Addie and Sons (Collieries) Limited v. Dumbreck*, [1929] A.C. 358 at 364-5; *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74 at 86, 96. There is an expression of opinion to the contrary by Crocket J. in *Hambourg v. The T. Eaton Company Limited*, [1935] S.C.R. 430, [1935] 3 D.L.R. 305, but I submit that the sounder view is the other way. As to the duty to inspect, see *Roberts v. Mitchell*, *supra*.

[ROACH J.A.: In the "highway" cases, is liability on the owner or the occupant?] On both, I submit, but certainly on the occupant: see the *Cunard* and *Taylor* cases, *supra*.

Pritchard v. Peto et al., [1917] 2 K.B. 173, relied on by the trial judge, is not contrary to my arguments here, or, if it is contrary, it is out of harmony with the other decisions.

There was no evidence to support the trial judge's finding that the danger was as apparent to the plaintiff as to the defendants, and that the plaintiff had assumed the risk. [HENDERSON J.A.: Is the burden not on you to give some evidence that the wall was in bad repair? We do not know from any evidence that this brick fell because it was loose; it might have been pushed or thrown.] That is a remote possibility. We have made out a *prima facie* case, and there has been no evidence for the defence suggesting inspection of the premises, or any other way in which the accident could have happened.

There is a heavy burden on the defendants before there can be a finding that a plaintiff has voluntarily assumed the risk: *Letang v. Ottawa Electric Railway Company*, [1926] A.C. 725, [1926] 3 D.L.R. 457, [1926] 3 W.W.R. 88, 41 Que. K.B. 312, 32 C.R.C. 150. We were not even *sciens*, much less *volens*. *Arnold v. Stothers & Gaby* (1910), 16 O.W.R. 234, 1 O.W.N. 829, and *Lucy v. Bawden*, [1914] 2 K.B. 318, relied on by the trial judge, are quite distinguishable on the facts. Further, the trial judge in *Lucy v. Bawden* considered himself bound by *Miller v. Hancock*, [1893] 2 Q.B. 177, which was overruled by *Fairman v. Perpetual Investment Building Society*, *supra*.

As to the defendant Club, we were, as found by the trial judge, an invitee for payment, and the Club's duty was to provide a reasonably safe golf course, free from any danger not obvious to us: *Maclean v. Segar*, [1917] 2 K.B. 325.

The damages assessed were less than the out-of-pocket expenses established at the trial. The trial judge stated that no evidence had been given to substantiate the statement as to loss of time, but counsel for the Commission had accepted this statement at the trial, and counsel for the Club did not question it. On appeal from a trial without a jury, this Court has power to increase the damages: *De Mott v. Clysdale*, [1931] O.R. 1, [1931] 2 D.L.R. 316 at 318.

The defendant Commission is not a servant or agent of the Crown. The lease to it makes this clear. The fact that the lease recites that the Commission enters into it with the consent of the Lieutenant-Governor in Council is not conclusive, because s. 39 of The Niagara Parks Act, R.S.O. 1937, c. 93, requires this. That section shows that, in respect of a tenancy of Dominion Crown lands, the Commission is in precisely the same position as any other lessee—it enters into such leases in its corporate capacity: s. 2 of the Act; s. 28 of The Interpretation Act, R.S.O. 1937, c. 1. [LAIDLAW J.A.: Did the Commission have any interest in the occupancy of this land except as a servant or agent of the Crown?] It may have been as a public service, but not in the capacity of a servant or agent of the Ontario Crown. It acts for the Ontario Government only in respect of Ontario Crown lands. There is nothing in the Act as to what is to happen to moneys derived from Dominion Crown lands.

International Railway Company v. Niagara Parks Commission, [1941] A.C. 328, [1941] 2 All E.R. 456, [1941] 3 D.L.R. 385, [1941] 2 W.W.R. 338, 53 C.R.T.C. 1, is authority for the proposition that the Commission is not a servant or agent of the Crown. *Graham v. Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O.R. 1, was cited to the Privy Council, but is not referred to in the judgment. If it is a decision against our contention (which we submit it is not), then it must be taken as overruled.

I refer also to the following cases: *Gilbert et al. v. The Corporation of Trinity House* (1886), 17 Q.B.D. 795; *St. Catharines v. H.E.P. Com'n*, [1930] 1 D.L.R. 409; *Graham et al. v. His Majesty's Commissioners of Public Works and Buildings*, [1901]

2 K.B. 781; *Marshal Shipping Company v. Board of Trade*, [1923] 2 K.B. 343; *Rattenbury v. Land Settlement Board*, [1929] S.C.R. 52, [1929] 1 D.L.R. 242.

Even if the Commission was an agent of the Crown, it waived its immunity by accepting service of the writ, through its solicitors, and undertaking to appear, then accepting service of the statement of claim, and taking other steps: *Tyndall v. Walker*, [1942] O.W.N. 91 at 93, 94, [1942] 2 D.L.R. 195, affirmed [1942] O.W.N. 186, [1942] 2 D.L.R. 804. [HENDERSON J.A.: I do not agree with that decision.] [LAIDLAW J.A.: It seems to me very doubtful.]

J. W. Thompson, K.C., for the defendant Commission, respondent: The Commission is an agent of the Crown, as is made quite clear by ss. 2(1), 2(2), 21 and 39 of The Niagara Parks Act. The *Graham* case, *supra*, is clear authority, and was not overruled by the *International Railway* case, which arose in contract. The *Graham* case was referred to with approval in *Peccin v. Lonegan and T. & N.O. Railway Commission*, [1934] O.R. 701, [1934] 4 D.L.R. 776. I refer, by analogy, to The Hydro-Electric Negligence Act, R.S.O. 1937, c. 68, which would be unnecessary if that Commission were not also a Crown agent, and also to s. 33 of The Canadian National Railways Act, R.S.C. 1927, c. 172. *Tyndall v. Walker, supra*, was not concerned with a question of immunity from suit, but merely of waiving the consent of the Attorney-General.

As to negligence—we never became the occupier of this building. Clause 4 of the lease reserves the right to use the lands for drilling. We got only a limited right of occupancy of the land. The plaintiff has not proved that we were an occupier. Merely filing the lease is not enough, because it is clearly limited. [HENDERSON J.A.: Are you not presumed to be in occupation of the property demised?] [LAIDLAW J.A.: There is a clause in the lease expressly requiring you to maintain.] There is no evidence that we did not, and in any case that is a matter between us and our lessor. There is no evidence that we have not maintained the property to the satisfaction of the Dominion Government engineer, which is all that we are required to do under the lease.

The liability to persons on the highway is limited to owners of adjoining premises, if it results from some structural condi-

tion of the building. The nature of the accident, and the extent of the control, must determine the liability.

The rule *res ipsa loquitur* is based upon complete control and duty. [ROACH J.A.: It is simply a rule of evidence.] Yes, but before a plaintiff can say that the onus is on the defendant to disprove negligence, he must show (a) that he was injured by some thing which (b) the defendant had under his exclusive control. The evidence here does not even prove that the plaintiff was hit by a brick.

H. F. Upper, K.C., for the defendant Club, respondent: An examination of the brick in question shows a latent defect in it which no amount of examination or inspection of the building would have disclosed. The plaintiff should have had the building examined, and offered evidence as to its condition. There is no evidence that anyone could see the place from which it fell, or that any other brick ever fell.

The old fort did not form any part of the course leased to the Club. Our rights and obligations are all set out in our lease, and there is no obligation to repair.

J. L. G. Keogh, in reply: The word "occupier" in the cases includes one who occupies only constructively, by virtue of the law.

Cur. adv. vult.

9th November 1945. The judgment of the Court was delivered by

LAILAW J.A.:—The plaintiff appeals from a judgment of Hope J., dated the 9th day of April 1945, dismissing an action for damages for personal injuries and loss alleged to have been caused by the negligence of either or both of the defendants.

The appellant was playing golf on the course of the defendant Niagara-on-the-Lake Golf Club Limited. The second green is located about six feet from the south wall of a building forming part of what was once Fort Mississauga. The appellant's ball was lying a few feet south of the building wall. Before he addressed the ball to play it on to the green, he was struck on the left shoulder by some object, causing at that time a bruising "the size of a robin's egg". He returned to the club house, visited the doctor, and, some hours after the accident, returned to the scene of the accident. He then found a large piece of

brick, together with some mortar, lying on the "apron", the area just outside the playing portion of the green. He alleged that this brick fell from the cornice or top of the wall of the building, fell upon him and caused his injury; that old Fort Mississauga and the adjoining lands were then, and still are, occupied by either or both of the defendants; and that he was upon the same "pursuant to their invitation or licence, express or implied".

The statement of claim sets forth particulars of negligence alleged against the defendants and alternatively that the plaintiff relies upon the rule *res ipsa loquitur*. No evidence was called at the trial by either defendant. The plaintiff contended in that court, and now contends, that a case of negligence was made out by the application of the rule mentioned, and that it has not been answered in fact or in law by the defendants.

The first requisite in proof of the plaintiff's claim is evidence from which it might be reasonably found that the injuries of which he complains were caused by his being struck by the brick falling from the cornice or roof of the building as alleged by him. He did not see the brick fall, and it does not appear in evidence that his attention was drawn to it at the time he was injured. On cross-examination he says he is "pretty sure" that it came from the roof of the fort. A witness, Frank Madsen, who was a fellow golfer in the foursome with the plaintiff, was called as a witness on his behalf. He was not asked by counsel for the plaintiff whether or not he saw the brick falling and striking the plaintiff, but in answer to the learned presiding judge he testified as follows: "I saw the brick fall, at least half way . . . I seen this brick fall from about half way . . . I just caught the black flash of the brick and seen it hit him on the shoulder. He went down. We went over and looked at him. His shoulder was all skinned." Another of the players, Myles Kaupp, stated: "I seen George as he grabbed himself and the brick at his feet."

I think that a jury, if the case were being so tried, or a judge without a jury, could judicially find upon the evidence given by Mr. Madsen and Mr. Kaupp that the brick filed as an exhibit fell from some part of the building and struck the plaintiff on the shoulder. But I would have great difficulty in making that finding of fact. One would reasonably think that the plaintiff would realize immediately at the time of the accident, and

beyond doubt forever afterwards, that the object which struck him was a brick from the building. It would be so close to him and falling at such a speed as to make the occurrence a most impressive one. Yet he does not speak of the brick being on the ground near his feet after he was struck. It was only when he returned to the scene hours later that he found the brick and some mortar. I am perplexed by the omission of counsel for the plaintiff to adduce evidence from Mr. Madsen that he saw the brick falling and striking the plaintiff. Also, it would have been more satisfactory to have had the benefit of cross-examination of the witness on this important evidence.

Assuming, however, and I do not wish it to be taken as a finding by me, that the injury to the appellant was caused in the manner alleged, I proceed to examine the principles of law and rules of evidence applicable to the case. The right to maintain the action against The Niagara Parks Commission is to be first considered. I am of the same view as the learned justice in the court below. I think it is plain that the Commission was an agent or servant of the Crown in the right of the Province of Ontario, and as such an action in tort could not be brought against it. Counsel for the appellant urges that under the provisions of a lease dated the 6th December 1934, between His Majesty the King, represented by the Honourable the Minister of National Defence, as lessor, and The Niagara Parks Commission as lessee, the Commission became a tenant and occupier of the building from which the brick is said to have fallen, separately in its own right and capacity as a corporate entity, and without regard to any relationship which might exist and make it an agent or servant of the Crown under other circumstances. But in my opinion there was no corporate power in the Commission to lease the premises, or to hold or occupy them, except as a representative of the Crown in the right of the Province. Moreover, the provisions contained in the indenture show to me that the capacity in which the Commission contracted for a leasehold interest in the property was clearly that of an agent and not that of a principal. It will be observed first that the Commission acted "with the consent of the Lieutenant-Governor in Council". Then certain financial obligations are undertaken by the Commission, *e.g.*, payment of "all charges, taxes, rates and assessments" of certain description; the supply of grass seed "at their sole cost and expense" in a certain event; the

cost and expense of construction of a sea wall; and relief and indemnity to the lessor against certain claims, demands and actions. But the Commission had no funds or treasury of its own and could only satisfy any obligations of the kind mentioned by the use of funds belonging to the Province of Ontario. It follows, I think, that the Commission held the premises, and was in occupation under the lease, as a representative of the Crown in the right of the Province and not in any separate or independent capacity. The learned trial judge has carefully set forth reasons for holding that this action cannot be maintained against The Niagara Parks Commission, and I adopt them fully. Nothing more need be added to what he has said so plainly. In view of this conclusion it is unnecessary to consider or discuss at length other questions with regard to the relationship in law between the appellant and the Commission. It may be pointed out, however, that the evidence does not clearly establish that at the time of the accident the appellant was on premises occupied by the Commission. The case sought to be made out by the plaintiff is based upon "invitation or licence, express or implied" to the appellant to be at the place of the accident. If that place was not in control or occupation by the Commission there could obviously be no invitation or licence from the Commission to be there.

The case as against Niagara-on-the-Lake Golf Club Limited also fails. There was no evidence of negligence adduced as against this defendant, and the plaintiff relied upon the rule *res ipsa loquitur*. But the essentials to give rise to the application of that rule are not present. The building from which the brick is said to have fallen was not under the management or control of this respondent. The happening of an accident does not raise a presumption of negligence on the part of a person who is not chargeable with the management or mismanagement of the thing causing it. The rule, as stated in *Scott v. The London and St. Katherine Docks Company* (1865), 3 H. & C. 596 at 601, 159 E.R. 665, is: " . . . where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

My opinion is that the appeal ought to be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Bench, Keogh, Rogers & Grass, St. Catharines.

Solicitors for the defendant Commission, respondent: Hughes, Agar, Thompson & Amys, Toronto.

Solicitors for the defendant Club, respondent: Upper & Musgrove, Niagara Falls.

[COURT OF APPEAL.]

Slattery v. Slattery et al.

Trusts and Trustees—Change of Trustees—Effect as against New Trustees of Notice of Assignment duly Given to Old Trustee before Change—Sufficiency of Investigations—Circumstances Constituting Actual Notice of Interest—Relief against Breach of Trust—Refusal of Relief—The Trustee Act, R.S.O. 1937, c. 165, s. 34.

Choses in Action—Assignment—Notice—Change of Trustees—Validity and Effect, after Change, of Notice Given to Original Trustee—The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, s. 52.

J.G.S., a beneficiary of an estate, assigned to the plaintiff, his wife, all his right, title and interest therein. The estate was being administered under the supervision of the Court, and the original of the assignment was filed with the Local Master and a copy was sent to the trustee of the estate. Later, the trustee was removed, and the defendants, two sons of the deceased, were appointed trustees in its place. The defendants proceeded to make distributions, including several payments to J.G.S. The plaintiff sued for damages for breach of trust in making these payments, and the defendants denied legal notice of the assignment.

Held, the plaintiff was entitled to judgment.

The notice to the original trustee was valid and effective, since that trustee was then the proper and necessary person to receive notice of the transfer of any rights in the estate. *In re Dallas*, [1904] 2 Ch. 385; *Addison v. Cox* (1872), L.R. 8 Ch. 76, applied. The weight of authority was in favour of the view that this effective notice had not been displaced by the change of trustees. *In re Wyatt*; *White v. Ellis*, [1892] 1 Ch. 188; *Ward and Pemberton v. Duncombe et al.*, [1893] A.C. 369; *Willes v. Greenhill* (1861), 4 DeG. F. & J. 147; *In re Wasdale*; *Brittin v. Partridge*, [1899] 1 Ch. 163, applied; *Hallows v. Lloyd* (1888), 39 Ch. D. 686, distinguished. Had the new trustees, upon their appointment, searched the files of the retiring trustee, they would have found the copy of the assignment.

Apart from the copy of the assignment, however, the circumstances were such that the defendants must be fixed with actual knowledge and notice of the plaintiff's interest in the estate, within the requirements laid down in *Lloyd v. Banks* (1868), L.R. 3 Ch. 488. The plaintiff had continuously exhibited to the defendants a personal interest in the estate, and their minds must have been "brought to an intelligent apprehension" of the nature of her interest. Aside from these circumstances, the defendants' solicitor had had express notice, by an affidavit sworn and filed by the plaintiff, and his knowledge and notice to him would be sufficient notice to the defendants. *Rickards v. Gledstanes* (1862), 31 L.J. Ch. 142; *The Saint John and Quebec Railway Company v. The Bank of British North America* (1921), 62 S.C.R. 346, applied. It was immaterial that the defendants' knowledge had been acquired before their appointment as trustees. *Ipswich Permanent Money Club, Limited v. Arthy*, [1920] 2 Ch. 257 at 270, referred to.

In the circumstances, the trustees were not entitled to be excused for their breach of trust under s. 34 of The Trustee Act. On the contrary, they had been so at fault as to have brought about their own misfortune.

Section 52 of The Conveyancing and Law of Property Act does not in any way alter the principles established with reference to notice of an assignment of a chose in action, but is mere machinery, enabling an assignee to sue in his own name. *Marchant v. Morton, Down & Co.*, [1901] 2 K.B. 829; *Torkington v. Magee*, [1902] 2 K.B. 427, applied.

AN APPEAL by the plaintiff from the judgment of Chevrier J., [1944] O.W.N. 401, [1944] 3 D.L.R. 455, dismissing an action for damages for breach of trust.

17th September 1945. The appeal was heard by HENDERSON, LAIDLAW and ROACH JJ.A.

Gordon F. Henderson, for the plaintiff, appellant: When she gave notice to the then trustee, the plaintiff's rights immediately attached to the interest of James G. Slattery in the estate, and this right was not divested by the change of trustee. It was not necessary for her to notify the new trustees of her interest in the estate: The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, s. 52. The new trustees are bound in law by the notice given to the former trustee; in law they did have notice. Notice once properly given is good for all time; it 'is just as if it had been given by an entry in a register: *Ward and Pemberton v. Duncombe et al.*, [1892] A.C. 369; *In re Wasdale*; *Brittin v. Partridge*, [1899] 1 Ch. 163. A second trustee is now, on the authorities, charged with notice to the first trustee. The defendants should have made the proper inquiries. [HENDERSON J.A.: What is your authority for saying that the new trustees are liable for paying out the money?] No case has gone quite to that length, but reference is made to the point in *Davis v. Hutchings*, [1907] 1 Ch. 356.

It is not only what the trustees actually knew, but what they ought to have known, that is important. Their conduct must be judged with reference to facts and circumstances which were known, or ought to have been known, to them: *Re Hurst*; *Addison v. Topp* (1892), 67 L.T. 96. The trustees had actual knowledge through their solicitor; his knowledge is that of his clients: *The Saint John and Quebec Railway Company v. The Bank of British North America* (1921), 62 S.C.R. 346, 67 D.L.R. 650. The appellant complied with the requirements of the statute, and did not need to do more than that. There is a concise statement of a trustee's duty in *Re Gamble*, 57 O.L.R. 504, [1925] 4 D.L.R. 768. As to the degree of constructive notice, it is only necessary to give to the trustees such notice as will provide them with an intelligent apprehension of the facts: *Crawford v. Canada Life Assurance Company* (1897), 24 O.A.R. 643 at 648. The plaintiff signed three consents at different

times, which on their face were executed only by persons interested in the estate.

Once it has been proved that notice of the assignment was properly given to the first trustee, the onus is upon the new trustees to show that they could not have found it among the first trustee's papers. They could easily have found it by the exercise of diligence.

R. A. Hughes, K.C., for the defendants, respondents: No express notice in writing was ever given to the defendants. [HENDERSON J.A.: Express notice was given in compliance with the statute. Once such notice has been given, is that not sufficient?] [ROACH J.A.: Is it your contention that the notice to the Local Master and the first trustee had to be repeated when the new trustees were appointed?] In the circumstances of this case, yes. As a matter of law, no actual notice was given to the persons who had charge of the fund. Notice, to be effectual, must be given to a person who at the time is a legal holder and has control of the funds, for the benefit of the assignor: *In re Dallas*, [1904] 2 Ch. 385. A right to a legacy under a will is an equitable chose in action: 4 Halsbury, 2nd ed. 1932, p. 423. There is no legal assignment of this equitable chose in action because it does not comply with s. 52 of The Conveyancing and Law of Property Act, in that there was no express notice in writing given to the trustees. If it is an equitable assignment, then the action must fail because all the parties interested or claiming to be interested are not parties to the action, in that the Bank of Toronto is neither a plaintiff nor a defendant: *Durham Brothers v. Robertson*, [1898] 1 Q.B. 765; 4 Halsbury, p. 463; *Cronk v. M'Manus* (1892), 8 T.L.R. 449; *Chalmers v. Machray* (1916), 26 D.L.R. 529, 26 Man. R. 105, 33 W.L.R. 656, 9 W.W.R. 1435 [affirmed 55 S.C.R. 612, 39 D.L.R. 396, [1917] 3 W.W.R. 361.]

Mere oral notice, given to the trustees in the course of a conversation concerning other general business, cannot be relied upon as fixing the trustees with notice of the assignment: *Saf-ron Walden Second Benefit Building Society v. Rayner* (1880), 14 Ch. D. 406.

If there was any duty on the respondents to inquire from the former trustee, it has been found as a fact that they did make inquiry from the late Local Master and from the retiring trustee, and were not informed of the existence of the assign-

ment. As to the nature and extent of such a duty, see *In re Booth's Settlement* (1853), 21 L.T.O.S. 239; *Hallows v. Lloyd* (1888), 39 Ch. D. 686; Warren, *Choses in Action*, 1899, pp. 97-8; Underhill, *Law of Trusts and Trustees*, 9th ed. 1939, p. 559.

Gordon F. Henderson, in reply.

Cur. adv. vult.

9th November 1945. The judgment of the Court was delivered by

LAILAW J.A.:—The plaintiff appeals from a judgment of Chevrier J., dated the 18th day of May 1944, after trial without a jury at Ottawa, whereby he dismissed an action brought by the appellant against the trustees of the estate of the late Bernard Slattery for damages for alleged breach of trust in making certain payments in partial distribution of the assets of the estate to James Gladstone Slattery, one of the beneficiaries, instead of to her, the appellant, as assignee of his rights and interest therein.

Bernard Slattery died on or about the 7th October 1922 and probate of his last will and testament was granted by the Surrogate Court of the County of Carleton on the 19th January 1923 to Annie Slattery, the widow of the deceased and the executrix named in his will.

On the 23rd July 1928 an order was made in chambers by His Honour Judge Constantineau upon application made by one of the heirs and legatees (Marion Dorothy Nighbor) of the deceased. The order provided that "all necessary enquiries be made, accounts taken, costs taxed and proceedings had for the administration and final winding up of the personal and real estate of Bernard Slattery . . . and for the adjustment of the rights of all parties interested therein before the Master at Ottawa"; and "that all balances which may be found due from the said estate to the heirs and legatees of the said Bernard Slattery be forthwith, after the same shall have been ascertained as aforesaid, paid into Court to the credit of this cause, subject to the further order of the Court."

On the 2nd February 1931 James Gladstone Slattery, a son of Bernard Slattery, deceased, assigned to the Bank of Toronto all his interest in the estate as security for an indebtedness to the bank. Subsequently, on the 20th November 1931, he executed an assignment to his wife, the appellant, of all his right,

title and interest in and to the estate and by the same instrument authorized and empowered his wife "to take all steps necessary or sign all documents or other instruments necessary to assist in the winding up of the said estate."

On the 15th December 1931 the original instrument of assignment from James Gladstone Slattery to his wife was filed with the Local Registrar (who is also the Local Master) of the Supreme Court of Ontario at Ottawa.

On the 13th February 1932 Annie Slattery died and probate of her will was granted on the 31st March 1932 to Capital Trust Corporation Limited.

The Bank of Toronto recovered judgment in the Supreme Court of Ontario against J. G. Slattery, on the 21st June 1932 for \$4,932.70 and costs, and on the 8th July 1932 J. G. Slattery assigned to the bank so much of the legacy or share to which he was entitled under the will of his mother Annie Slattery as was required to satisfy fully his indebtedness to the bank. Payments were thereafter made from time to time by the Capital Trust Corporation Limited to the bank, leaving a balance owing as of 10th January 1944 (the first day of trial) of \$431.03.

On the 18th September 1933 solicitors acting "at the request of Mrs. Slattery" sent by letter to the Capital Trust Corporation a copy of the assignment from James Gladstone Slattery to his wife, and in the letter they directed attention to the fact that the original of the assignment was filed with Mr. Magee, the Local Registrar, on the 15th December 1931. Receipt of the copy of the document was acknowledged by Capital Trust Corporation Limited on 19th September 1933.

On the 12th November 1935 counsel on behalf of the respondents, Bernard Patrick Slattery and John Joseph Slattery, made an application in chambers to the Honourable Mr. Justice Hogg, and an order was made which provided, *inter alia*, for the passing of accounts in the estate of Bernard Slattery deceased: that upon the said accounts being passed the applicants John Joseph Slattery and Bernard Patrick Slattery be appointed trustees of the estate of Bernard Slattery in the place and stead of the Capital Trust Corporation Limited: that a bond to the satisfaction of the Local Master at Ottawa be furnished; that upon the said accounts being passed and the bond filed and approved the order of His Honour Judge Constantineau made on the 23rd July 1928 be set aside. It appears from the recital in the order

mentioned—and it is of importance to note—that “all the adult beneficiaries of the said estate except Mary Ida Slattery, James Gladstone Slattery and Edward T. Slattery” consented thereto. From the evidence it appears that Mary Ida Slattery was represented by counsel on the application. Furthermore, an affidavit made by Mary Ida Slattery, dated the 5th November 1935, was filed in the proceedings and in para. 1 thereof it is set forth as follows: “I am the assignee under assignment dated 20th November, 1931, of the share of my husband, the said James Gladstone Slattery, in the estate of the late Bernard Patrick Slattery, of the City of Ottawa.”

Proceedings to take accounts show that the appellant Mary Ida Slattery was present from time to time in person and by counsel and was recognized by the respondents as a person interested in the estate of Bernard Slattery deceased, *e.g.*, a number of consents signed by B. P. Slattery and by J. J. Slattery contain in the opening words,—“We, being all persons interested in the estate of Bernard Slattery (with the exception of Mary Ida Slattery and James Gladstone Slattery) hereby consent” A report of the Master also shows that the appellant appeared by counsel in the presence also of counsel for the respondents.

The accounts of Annie Slattery, executrix of the estate of Bernard Slattery, were not passed as directed by order of the Honourable Mr. Justice Hogg dated the 12th November 1935, but, nevertheless, upon application of the respondents, an order was made by the Honourable Mr. Justice Chevrier in chambers on the 12th December 1936, whereby the respondents were appointed trustees of the estate of Bernard Slattery deceased in the place and stead of Capital Trust Corporation Limited. On this application it again appears in evidence that counsel represented Mary Ida Slattery and that all the adult beneficiaries of the estate of Bernard Slattery deceased consented to the order “except Mary Ida Slattery, James Gladstone Slattery and Edward T. Slattery”. Following the date of this order the appellant was again present as before on proceedings to take accounts. Likewise consents at various times (20th September 1938, 20th July 1941, 28th December 1941) signed by her show her to be a person “interested in the estate of Bernard Slattery.” On 16th April 1941 solicitors acting for her sent a letter addressed to “B. Slattery, Esq.” in which it is stated in opening: “We have

been instructed by our client, Mrs. J. G. Slattery to advise you that we have been informed that certain properties belonging to the Slattery Estate have been sold." They ask for submission to them of the "scheme of distribution", and direct attention to the fact that the accounts of the Slattery estate have not been passed for some time. In answer "B. Slattery" merely stated that the accounts would be presented for passing shortly at the convenience of the Local Master.

The respondents made partial distribution of the estate of Bernard Slattery. On 29th September 1938 a cheque for \$500 was issued and sent to James G. Slattery; on 25th July 1941 a further cheque for \$500 was also issued to him; and on 31st December 1941 a cheque for \$3,700 was made and given to him.

In defence to the claim that the payments made by the respondents to James G. Slattery were made in breach of trust, the respondents say that they have no knowledge of the alleged assignment having been made to the appellant by her husband James Gladstone Slattery; they deny that such an assignment was made, and if it was in fact made they plead that they were not notified thereof as required by law. Further, and I quote in part from the statement of defence of Bernard Patrick Slattery, who says, "if the assignment was in fact made as alleged (which is not admitted but denied) that the making of such an assignment and the depositing thereof with the Capital Trust Corporation Limited and/or the filing thereof with the Local Registrar of this Court was not legal notice to him of the existence of such an assignment or such notice as to give rise to this action. The said defendant Bernard Patrick Slattery further says that the plaintiff never at any time suggested in any manner whatsoever that such an assignment as alleged existed". The statement of defence filed and served on behalf of the respondent John Joseph Slattery is identical in language with the statement of defence of the other respondent above quoted.

The learned trial judge was of the opinion that the plaintiff had not satisfied the onus of establishing that the defendants had been given by her such notice of the assignment as is contemplated by the statute and authorities, and the action, "thereby failing", was dismissed with costs.

The real question to be determined is this: Are the respondents responsible in law for failure to make the payments in

question to the appellant? The answer to this question depends primarily upon a finding as to whether or not the respondents had notice binding on them in law of a valid assignment from James Gladstone Slattery to the appellant of his interest in the estate. There is no evidence or ground upon which the validity of the assignment can be successfully attacked. It is valid and absolute. The matter to be determined at once is the sufficiency of notice to the respondents of the assignment. I consider first the effect in law on the respondents of the filing of the assignment with the Local Registrar of the Court on the 15th December 1931 and of the copy which was sent on behalf of the appellant to the Capital Trust Corporation Limited on 18th September 1933. Undoubtedly the persons receiving this instrument or copy of it would have complete notice of the assignment of rights therein described. Were those persons the proper ones to receive notice? Buckley J. in *In re Dallas*, [1904] 2 Ch. 385 at p. 398, says (quoting from a sentence in Lord Selborne's judgment in *Addison v. Cox* (1872), L.R. 8 Ch. 76 at 79) that the notice must be given to a person who is "bound by some contract or obligation, existing at the time when the notice reaches him, to receive and to pay over, or to pay over, if he has previously received, the fund." It must be notice "acquired in fact by the legal holder of the fund": per Buckley J. in *In re Dallas*, *supra*, at p. 399. Applying this rule, it is my opinion that the filing of the assignment with the Local Registrar of the Court and of a copy with the Capital Trust Corporation satisfied all requirements in law. The Local Registrar had no power or authority and was under no obligation to pay over to persons entitled thereto any part of the trust funds. He was, however, directed by the order of His Honour Judge Constantineau to make all necessary enquiries for the administration and final winding up of the personal and real estate of Bernard Slattery and "for the adjustment of the rights of all parties interested therein". It was proper that he should be notified of the assignment. Capital Trust Corporation Limited was trustee of the estate of Bernard Slattery at the time the copy of the assignment was received by it. It was the legal holder of the trust property and was the proper and necessary person in law to receive notice of the transfer of any rights thereto. It can scarcely be doubted that if distribution of the assets of the estate had been made by Capital Trust Corporation Limited, the knowledge and notice

it possessed of the assignment would be effective to fix it with responsibility to the appellant. Was this effective notice displaced by the change of trustees from the Capital Trust Corporation Limited to the respondents? In my opinion the weight of authority is that it was not displaced. In *In re Wyatt; White v. Ellis*, [1892] 1 Ch. 188, it was held that the priority obtained by an assignee during the lifetime of a trustee could not be lost by the death of the trustee. In *Ward and Pemberton v. Duncombe et al.*, [1893] A.C. 369, Lord Macnaghten, at p. 395, refers to the judgment of Westbury L.C. in *Willes v. Greenhill* (1861), 4 DeG. F. & J. 147 at 150, 45 E.R. 1139, and quotes,—“It is well established, whether rightly or wrongly, that upon assignments or mortgages of equitable interest in property held by trustees, the duty devolves upon the assignee or mortgagee to give to the trustees notice of the assignment or incumbrance.” He then proceeds as follows:

“But it may be that when an assignee or mortgagee has once discharged that duty he has done all that the rule requires of him, and that for the rest the law holds as Lord Cairns lays it down, and that he is not, on a change of trustees, to be deprived of his pre-existing equitable title by the diligence or by the happy thought of a subsequent incumbrancer.”

In *In re Dallas, supra*, at p. 399, the above-mentioned cases of *In re Wyatt* and *Ward v. Duncombe* are referred to as authority for the proposition “that an effective notice is not displaced by any change of the trustees; so that if notice be given, say, to all the trustees, and they all cease to be trustees, and three other persons become trustees who have no notice, the original notice is good.” In *In re Wasdale; Brittin v. Partridge*, [1899] 1 Ch. 163 it was held that “An assignee of a reversionary interest in a trust fund who has given notice to all the trustees in existence at the time of his assignment is under no obligation to give any further notice” It is stated that this proposition is or may be subject to exception, which, however, does not now arise upon the facts in this case. The decision in *Hallows v. Lloyd* (1888), 39 Ch. D. 686, must be read in the light of the particular facts in that case. There there was no notice amongst the trust documents, and a search of them would have disclosed nothing of it to the new trustees, whereas in the case at bar the respondents could have found the notice of assignment in the files of the retiring trustee, Capital Trust Corporation Limited,

if they had exercised a reasonable degree of diligence. A copy of the document was produced at trial from the files of the corporation by the manager of the estates department. That it is the duty of persons appointed new trustees to look into the trust documents, to see what incumbrances their predecessors had notice of, is plainly stated in *Hallows v. Lloyd*, *supra*, but in so far as that judgment may be considered in conflict with the law as laid down in *Ward v. Duncombe* and *In re Dallas*, *supra*, it must be taken as overruled.

Apart from the effect in law on the respondents of the notice given by the appellant to Capital Trust Corporation Limited and to the Local Master prior to their appointment, I consider whether after their appointment they had notice sufficient in law to place them under a direct responsibility to the appellant. The kind and extent of that notice is described clearly in *Lloyd v. Banks* (1868), L.R. 3 Ch. 488, at pp. 490-1, where Lord Cairns L.C. says:

“ . . . I think the Court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by any evidence of casual conversations, much less by any proof of what would only be constructive notice—but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it in the execution of the trust. If it can be shewn that in any way the trustee has got knowledge of that kind—knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired—then I think the end is attained, and that there has been fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which has been created.”

Now does the evidence show that the minds of the trustees or of one of them was “brought to an intelligent apprehension” of the nature of the appellant’s interest in the estate? I have purposely stated the facts at some length, and a review of them discloses that the appellant was exhibiting to the respondents continuously a personal interest in the estate of Bernard Slat-

tery by her many attendances and her activities in connection with the accounts of the estate. That interest was recognized by the respondents by the form and content of consents obtained from time to time from "all persons interested in the estate of Bernard Slattery (with the exception of Mary Ida Slattery and James Gladstone Slattery)", and from consents, *e.g.*, that dated the 20th July 1941 (as to distribution of assets of the estate) to which the appellant was a signatory as a person "interested in the estate". The nature of the appellant's interest in the estate was also disclosed by her, and in my opinion the respondents had such knowledge of it "as would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired." In her affidavit dated the 5th November 1935, the appellant sets forth her position in the clearest possible language: "I am the assignee under assignment dated 20th November, 1931, of the share of my husband, the said James Gladstone Slattery, in the estate of the late Bernard Patrick Slattery, of the City of Ottawa." This affidavit was filed and used in opposition to an application made by the respondents for appointment as trustees of the estate. The whole content of the document is of such a nature as to make it inconceivable that the respondents had not knowledge and notice thereof. Counsel on their behalf could not properly present their application to the Court without instructions from the respondents by way of reply to the matters set forth in the affidavit. It would be known to the respondents, beyond doubt in my opinion, that the appellant did not consent to the order made by the Honourable Mr. Justice Hogg on the 12th November 1935, but on the contrary opposed their application for appointment as trustees. Counsel for the appellant testified at the trial that on her instructions he appeared on her behalf on the return of the motion before the Honourable Mr. Justice Hogg. There is also evidence that the respondent Bernard Patrick Slattery was present at the hearing of that application. The capacity in which the appellant acted, and her right to be heard in the proceedings, would be well known and understood by the respondents. It may be observed that the order made by Hogg J. was admittedly before the respondent Bernard Patrick Slattery at a later date, 9th December 1936, when he made an affidavit and annexed a copy of the order to it as an exhibit. Apart altogether from the actual knowledge and notice possessed

by the respondents, as I have found, it is beyond question that from the contents of the affidavit of the appellant to which I have referred the solicitor for the trustees had express notice of the assignment. His knowledge and notice to him would be in law sufficient notice to the trustees: *Rickards v. Gledstones* (1862), 31 L.J. Ch. 142; *The Saint John and Quebec Railway Company v. Bank of British North America* (1921), 62 S.C.R. 346 at 350, 67 D.L.R. 650. It may be observed too that it is immaterial that the knowledge of the respondents was acquired before their appointment as trustees: *Ipswich Permanent Money Club Limited v. Arthy*, [1920] 2 Ch. 257 at 270. Again, on 16th April 1941, the respondent Bernard Patrick Slattery was aware that the appellant was asserting rights as a person interested in the estate, because he was then informed that she was a client of solicitors acting for her. The evidence throughout is wholly inconsistent with the plea in the statements of defence "that the presence of the wives of any of the beneficiaries was interpreted as merely an indication of interest in the family heritage", and consistent only with the conclusion that she was openly asserting her own right as an assignee from her husband, one of the beneficiaries of the estate, of his interest and share therein. Thus in my judgment the respondents as legal holders of the trust fund had notice in fact and in law of the assignment from James Gladstone Slattery to the appellant, and that notice was operative, even though it was not obtained directly from her. It was acquired "under such circumstances as that, as a matter of business, the owner of the fund would be taken to have known it": per Buckley J. in *In re Dallas, supra*, at p. 399.

I have rested my judgment, as stated, upon evidence other than the testimony of the appellant at trial, but it may be pointed out that she then stated that in 1931 she told Bernard Patrick Slattery, one of the respondents, that she had an assignment from her husband of his rights in his father's estate.

Counsel for both parties refer to and rely on the provisions of The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, s. 52. This section does not in any way alter the law or principles applicable to the case under consideration. It is in language almost the same as legislation in England (Law of Property Act, 1925, c. 20, s. 136), which has been held there to be machinery only, enabling an action to be brought in the name of an assignee: *Marchant v. Morton, Down & Co.*, [1901]

2 K.B. 829 at 832; *Torkington v. Magee*, [1902] 2 K.B. 427 at 435, referred to in *Trubenizing Process Corporation v. John Forsyth, Limited*, [1943] S.C.R. 422 at 428, 3 Fox Pat. C. 123, 3 C.P.R. 1.

There was, in my opinion, a valid legal assignment of a chose in action, with all the requisites contained in the statute sufficiently satisfied in law. But, in any event, there was an equitable assignment from James Gladstone Slattery to the appellant under circumstances which made the respondents directly responsible to her, and secured her rights as against the estate of which they were trustees. The enforcement of those rights ought not to be prevented by technicalities: See *William Brandt's Sons & Co. v. Dunlop Rubber Co.* (1905), 74 L.J.K.B. 898 at 902.

Counsel for the respondents urges that James Gladstone Slattery was agent for the appellant to receive for her the moneys in question in this action. It is sufficient to say that the evidence does not support that argument, nor permit of such a finding. On the contrary, I am satisfied that there was no such agency and no such relationship was ever in contemplation of any of the parties concerned.

It remains to mention the matter of the assignment from James Gladstone Slattery to the Bank of Toronto of his interest in the Bernard Slattery estate, as security for the payment of a debt owing by him. An interesting question occurs to my mind as to the effect on the rights of the bank under that instrument by reason of its action in recovery of judgment against the debtor for the amount of the debt for which the security was given, and subsequently taking an assignment of his rights in the estate of Annie Slattery "to satisfy fully the said indebtedness" under the judgment. But that question does not require determination because the appellant, through counsel, expresses a willingness to have her claim treated as being subject to a prior claim of the bank to the balance owing to it by James Gladstone Slattery, amounting, at the first day of trial, to \$431.03.

It is also admitted that the proceeds of cheques issued by the respondents to James Gladstone Slattery in 1938 and in July 1941 were received by the appellant, but the proceeds of the cheque dated 31st December 1941 have not been received by her. The respondents must, therefore, be held liable to the

appellant for the amount thereof, \$3,700, less the amount of the balance owing at the date of judgment by the estate to the Bank of Toronto.

Counsel for the respondents urges that the respondents should be excused from any breach of trust under the circumstances, and pleads s. 34 of The Trustee Act, R.S.O. 1937, c. 165. I can find no good reason to excuse the respondents, but on the contrary find them to be at such fault as to have brought about their misfortune. By the exercise of reasonable care and prudence they would have secured the rights to which the appellant is entitled, in accordance with their duty so to do. To say the least, they would not have made payments to James Gladstone Slattery, as I think they did, without any regard to the interest or rights of the appellant in the estate.

My opinion therefore is that the appeal ought to be allowed; the judgment of the Court below ought to be set aside, and, in place thereof, judgment for the plaintiff should be entered for the amount ascertained in the manner I have set forth. The appellant ought to have the costs of the appeal and of the action in the court below.

Appeal allowed with costs throughout.

Solicitors for the plaintiff, appellant: Gowling, MacTavish & Watt, Ottawa.

Solicitor for the defendants, respondents: Roydon A. Hughes, Ottawa.

Solicitor for J. G. Slattery, third party: O. F. Howe, Ottawa.

[COURT OF APPEAL.]

Re Dawson and Bell.

Real Property—Oil and Gas Lease—Nature of Lessee's Interest and of Compensation Payable—Effect of Division of Tract of Land Subject to Lease—The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, s. 14(1).

J.F.D., the owner of a 125-acre farm, entered into an agreement with B. Co. whereby he "granted, demised and leased" it to B. Co., "for the purpose and with the exclusive right of drilling and operation for Petroleum Oil and Gas" for the term of "ten years . . . and as much longer as Oil and Gas shall be found in paying quantities on the premises". B. Co. agreed to pay compensation at the rate of \$1 per acre per year until a well was brought in, and thereafter, in the case of gas, \$100 per year for each producing well. Two gas wells were brought into production within the ten-year period. After J.F.D.'s death intestate, an arrangement was made among the heirs-at-law, whereby the appellant and the respondent (a son and a daughter of J.F.D.) became owners of separate and unequal parts of the farm. The two wells were both on the part acquired by the appellant.

Held, the appellant was not entitled to retain the whole \$200 paid by B. Co.'s assignee, but it should be apportioned between him and the respondent in the same proportions as the parts of the farm owned by each of them bore to the total acreage subject to the lease.

Per HENDERSON and MCRUER JJ.A.: The compensation payable was not the purchase price of gas as a chattel, but was in the nature of rent, since the right acquired by the lessee under the lease was in the nature of a *profit à prendre*, which was an interest in the land itself. The whole 125-acre tract remained subject to the lease, and the lessee had rights in every part of it. It could not be successfully argued that, although the respondent's land was burdened with the lease and the rights granted thereunder, she was not to be entitled to compensation for these burdens unless and until the lessee chose to complete a well thereon. *Sutherland v. Heathcote*, [1892] 1 Ch. 475; *McIntosh v. Leckie et al.* (1906), 13 O.L.R. 54; *Canadian Railway Accident Co. v. Williams* (1910), 21 O.L.R. 472; *Reg. v. Westbrook*; *Reg. v. Everist* (1847), 10 Q.B. 178; *Daniel v. Gracie* (1844), 6 Q.B. 145; *Coal Commission v. Earl Fitzwilliam's Royalties Company et al.*, [1942] Ch. 365, and other authorities, applied; American decisions reviewed.

Per LAIDLAW J.A.: It was apparent that the rights acquired by the grantee under the agreement extended to and included the whole tract of land described, and it did not lie within the power of either party to make it applicable to a part only. The compensation throughout, despite its change in form, continued to be payable for the rights granted by the agreement, and was in substance rent for the use and occupation of the whole 125-acre tract of land. Every part of the tract earned its proportionate part of the whole compensation payable, and there was nothing to support the view that the grantee's obligation was in the nature of a floating charge which, if gas was found in sufficient quantities, crystallized and fixed itself to that part only upon which a well was completed.

The lessee was also bound, under the agreement, in addition to paying the \$100 per well, and as part of the consideration, to give the lessor "the privilege of using enough gas to heat dwelling, if any, on said premises". The dwelling-house and all the farm buildings were on the part of the farm acquired by the appellant.

Held (LAIDLAW J.A. dissenting on this point), this was a right to which the appellant alone was entitled, and the gas should not be valued and apportioned in the same way as the royalty.

Per HENDERSON and MCRUER JJ.A.: The right to receive and use gas for heating was clearly appurtenant to that part of the land on

which the house stood, and when the respondent joined in a conveyance in which she released to the appellant all her claims on the lands conveyed to him, it carried with it any claim to the gas which was supplied as an appurtenance to the house erected on those lands. *Per LAIDLAW J.A., dissenting:* The total compensation payable under the agreement expressly included the privilege of using enough gas to heat the dwelling on the premises, and the appellant was not entitled to that additional benefit by virtue of his ownership of that part of the tract of land on which the dwelling was situate. It was part of the whole compensation payable, and its value should be divided between the parties in the same proportions as the rest of that compensation.

AN APPEAL from an order of Mackay J., made at Chatham, directing the apportionment between the parties of moneys payable under an agreement. The facts are fully stated in the reasons for judgment.

13th and 14th September 1945. The appeal was heard by HENDERSON, LAIDLAW and MCRUER JJ.A.

Ralph D. Steele, for the plaintiff, appellant: All money payments by the gas company should be paid to the appellant, and he is entitled to all the free gas for heating under the contract. What the gas company obtained, under the lease of 1913, was a licence to go upon the land and reduce the gas and oil to possession, whereupon it became the company's property: Thornton, *Oil and Gas*, 5th ed. 1932, vol. 1, pp. 69, 105, 125, 145; *Hurst et al. v. Paken Oil Co. et al.* (1941), 152 S.W. (2d) 981; *Osborn et al. v. Arkansas Territorial Oil & Gas Co.* (1912), 146 S.W. 122. This is a payment under a contract, not a rental out of land. [LAIDLAW J.A.: There is a grant and demise of the whole premises.] It is a grant for the purpose of removing oil and gas. Payments due under the contract are not rent in the ordinary sense, but a contractual debt, and they are governed by the terms of the contract: 20 Halsbury, 2nd ed. 1936, pp. 158-9; Bell, *Landlord and Tenant*, 1904, p. 189; Williams, *Canadian Law of Landlord and Tenant*, 2nd ed. 1934, p. 170. [HENDERSON J.A.: We do not find any grant here of oil and gas. It could not be argued that this was a sale of oil and gas when reduced to possession; that is a different thing.] In five or six cases the Courts have decided that the right to compensation goes with the ownership of the land on which the well is situated. The free gas for heating is assimilated to the other royalties payable under the agreement, and should be dealt with in the same manner: Thornton, *op. cit.*, vol. 2, p. 655.

Where land subject to an oil and gas lease is sold, then, in the absence of provision to the contrary, the royalties payable

under the agreement go with the land: Thornton, *op. cit.*, vol. 2, pp. 666, 669. Where land subject to such a lease, and on which producing wells exist, is sold, as here, in parts, the lease may be considered as a unit, but each parcel of the land carries with it the royalties from gas or oil produced on it, and no portion of the royalties from gas produced on any other part: Glassmire, Oil and Gas Leases and Royalties, 2nd ed. 1938, pp. 301-2, 304, 305; Morrison and De Soto, Oil Rights, 1920, p. 101; Summers, Oil and Gas, 1938-40, vol. 1, p. 227, vol. 3, pp. 194, 517-33; 1934 supplement, pp. 111-13; *Hammond v. Hammond et al.* (1943), 292 Ky. 659, 167 S.W. (2d) 865; *Hurst et al. v. Paken Oil Co. et al.*, *supra*.

Where heirs acquire such land by devise or intestacy, they receive the royalties equally, but here two of the five heirs acquired by purchase, and royalties go with the land. This rule has been established in at least six of the United States of America: *Kimbely v. Luckey et al.* (1919), 72 Okla. 217, 179 Pac. 928; *McRae et al. v. Japhet et al.* (1925), 269 S.W. 829; *Hinds v. McCord* (1931), 45 S.W. (2d) 442; *Fairbanks et al. v. Warrum et al.* (1913), 56 Ind. App. 337; *Osborn et al. v. Arkansas Territorial Oil & Gas Co.*, *supra*; *Rymer v. South Penn Oil Co.* (1904), 54 W. Va. 530 at 543; *Fisher v. Teter* (1921), 89 W. Va. 693; *Pittsburgh & West Virginia Gas Co. v. Ankrom et al.* (1918), 97 S.E. 593; *Musgrave v. Musgrave et al.* (1920), 103 S.E. 302. Natural gas is a fluid mineral, and these cases are applicable to the circumstances of the case at bar. [McRUER J.A.: This lease is a burden upon the land that was conveyed, and the compensation for that burden was payment under the lease. Are there any cases where it is so regarded?] The courts have been governed by the exact wording of the instrument. Pennsylvania is the only State in which a different rule has been adopted, and there the cases refer to devisees, not purchasers.

J. A. McNevin, K.C., for the respondent: When the lease was executed in 1913, the lessor severed the surface rights from the mineral rights. From that moment, his control over the mineral rights was gone: *McIntosh v. Leckie et al.* (1906), 13 O.L.R. 54, followed in *Canadian Railway Accident Co. v. Williams* (1910), 21 O.L.R. 472; Thornton, *op. cit.*, vol. 2, p. 688. [HENDERSON J.A.: When the property was conveyed to the appellant, nothing was reserved. How can the respondent claim

anything now? If your client wanted a part of the profit, she should have contracted for it.]

It is a dangerous practice to apply American decisions to our law. If we are to consider American authorities, I refer to *Wettengel v. Gormley* (1894), 160 Pa. 559, which is somewhat similar to the case at bar.

Ralph D. Steele, in reply.

Cur. adv. vult.

12th November 1945. HENDERSON J.A. agrees with MCRUER J.A.

LIDLAW J.A. (*dissenting in part*):—The facts in this case have been carefully and fully stated by my brother McRuer.

The question to be decided by the Court may be stated as follows: Is the amount of compensation payable by Dominion Natural Gas Company Limited as assignee of the rights of The Beaver Oil and Gas Company Limited under the provisions set forth in a memorandum of agreement and lease made and entered into on the 15th January 1913 between the late J. F. Dawson and The Beaver Oil and Gas Company Limited, divisible in law between the appellant, owner of 75 acres, and the respondent, owner of 50 acres, of the land described in the memorandum of agreement and lease, in the proportion that the acreage owned by each of them respectively bears to the total acreage?

The answer to this question depends, in my opinion, on the nature of the right granted, and for which compensation was payable under the terms and conditions of the agreement dated the 15th January 1913. The grantor (so-called by me for convenience) thereby “granted, demised and leased” to the grantee (also so-called by me for convenience) “that certain tract of land situate in the Township of Romney . . . containing 125 acres, more or less.” The nature of the right granted in that tract of land is defined by the words in the memorandum as follows: “for the purpose and with the exclusive right of drilling and operation for Petroleum Oil and Gas”.

In addition thereto the grantee acquired: (1) “the right of using sufficient water for all necessary purposes from the premises hereby leased, except from wells on said lands”; (2) “the right of way over and across said premises”; and (3) “the exclusive right to lay pipes to convey Oil and Gas”; (4) “the right

to bring upon, erect and remove any machinery or fixtures required”.

The term of the grant, demise and lease is for ten years from the date of the agreement “and as much longer as Oil and Gas shall be found in paying quantities on the premises.”

It is at once apparent that the rights acquired by the grantee extend to and include each and every acre of the whole tract of land described in the memorandum. It does not lie within the power of either party to make the agreement applicable to a part only of the described tract of land. Conversely, each and every part of the whole tract is subject to the encumbrance put upon it by the grantor in favour of the grantee. No one questions that the part of the tract now owned by the respondent is subject to all the rights of user granted by the owner of the whole tract before it was divided. The division of the tract into parts does not release either part from the burden to which it was subject theretofore. Thus, the grantee acquired by contract a right of user and occupation of a nature which was indivisible, and attached to every part of the whole tract of land described in the memorandum of agreement.

What was the nature of the compensation payable for that right? The memorandum witnesses that the grant, demise and lease of the entire tract of land was made “for the consideration of One Dollar, [and] the rents, covenants and agreements hereinafter mentioned”. The “rents, covenants and agreements hereinafter mentioned” include these:

(1) The grantee shall pay to the grantor “one dollar per acre per annum until the completion of a well on the said premises.” Undoubtedly this payment is a rent payable in respect of the whole tract at the specified rate for each and every acre in it.

(2) “In consideration of the said grant and demise [the grantee] agrees to give [the grantor] one barrel of every ten barrels, or its equivalent in cash, of petroleum obtained or produced on the premises herein leased.” Whether the right acquired by the grantee be paid for in petroleum, or its equivalent in cash, it is in reality a rent for the right to use and occupy the whole premises, and not a part only of it.

(3) “It is further agreed that if gas is found in sufficient quantities to utilize, the consideration in full [to the grantor] shall be 100 dollars per annum for each well yielding gas in

paying quantities, or capped . . . and the privilege of using enough to heat dwelling, if any, on said premises”.

In the event described, *viz.*, “if gas is found in sufficient quantities to utilize” the compensation which the grantee agrees to pay to the grantor in full consideration (for the grant and demise) is measured by the number of wells “yielding gas in paying quantities, or capped”, at the rate of \$100 per annum for each such well, together with the privilege of using a specified amount of gas, *viz.*, “enough to heat dwelling, if any, on the premises”. But neither the change in amount of compensation payable nor that in the method by which the parties agreed to measure it affects the nature of it. It continues to be compensation the grantee agreed to pay for the species of right granted and demised to it by contract. It is in substance rent for the use and occupation for a specified purpose of “that certain tract of land . . . containing 125 acres more or less”. The rent is appurtenant to the whole acreage. Every part of the tract earns its proportionate part of the whole compensation payable. There is nothing in the agreement to support or justify the view that the obligation on the part of the grantee to pay compensation—which, as I have said, is in substance rent—is in the nature of a floating charge which, in event of finding gas in sufficient quantities to utilize, crystallizes and fixes itself to that part only of the tract of land upon which a well yielding gas in paying quantities is completed.

If the grantor in his lifetime had transferred to another person title to part of the acreage contained in the whole tract of land described in the memorandum of agreement, the transferee would, I think, be entitled to that portion of the total rent (or compensation) payable under the agreement which the acreage transferred bears to the total acreage. The fact that the transfer of title to part of the total acreage was made to the respondent—and the remainder of the acreage to the appellant—by agreement of all persons having any interest in the whole tract of land does not except such a case from the application of the principle. Thus, in my opinion, the respondent is entitled in law to 50/125ths of the total compensation payable, either in cash or otherwise, by Dominion Natural Gas Company Limited. The total compensation payable under the agreement expressly includes the privilege of using enough gas to heat the dwelling on the premises. The appellant is not entitled to that

additional benefit by virtue of ownership of that part of the tract of land on which the dwelling is situate. It is made by agreement part and parcel of the whole compensation payable, and the value of it should be divided between the parties in the same proportions as the balance of the compensation.

In the view I take of the matter in appeal it is unnecessary, under the particular circumstances, to consider or decide many interesting questions. I express no view as to whether oil and gas found on a tract of land form part of the soil thereof before they are discovered; whether the ownership of land includes ownership of oil or gas which, for a time, may lie below the surface, but from time to time moves to other tracts; whether, in general, an agreement whereby a person acquires the right to use lands for the purpose of drilling and operation for oil and gas ought to be viewed in law as one for the sale of personalty after the oil or gas is reduced to possession; nor whether the compensation payable under the particular agreement in question is in the nature of a royalty. Again, I do not find the conflicting views expressed in many of the courts of the United States to be of use in the determination of the question now before this Court, depending, as it does, in my opinion, upon the form and content of a particular memorandum of agreement and lease.

My conclusion is that the appeal ought to be dismissed, with costs, and the judgment *in toto* of the learned judge in the court below should be affirmed.

McRUER J.A.:—This is an appeal by Douglas Laird Dawson from the judgment of Mackay J., ordering that all payments due or to become due under a certain oil and gas lease be divided between the appellant and the respondent in proportions of three-fifths to the appellant and two-fifths to the respondent, and that the value of all free gas supplied or hereafter supplied under the lease, calculated at rates at which natural gas is sold by the Dominion Natural Gas Company, Limited, to consumers in the township of Romney, in the county of Kent, shall be divided between the appellant and the respondent in the same proportions.

In the year 1913 one John Fletcher Dawson, as the party of the first part, entered into an agreement in writing, which for the purpose of convenience I shall refer to as the "lease", with

The Beaver Oil & Gas Company Limited, as the party of the second part, whereby "for the consideration of One Dollar, [and] the rents, covenants and agreements" therein mentioned he did "grant, demise and lease unto the party of the second part, for the purpose and with the exclusive right of drilling and operation for Petroleum Oil and Gas, all that certain tract of land situate in the Township of Romney in the County of Kent and Province of Ontario, being composed of the W $\frac{1}{2}$ Lot 190 Galbert Road and the E $\frac{1}{2}$ of the W $\frac{1}{2}$ Lot 28, Con. 2—containing 125 acres, more or less."

The agreement provided that the party of the second part should have and hold the premises "exclusively for the said purpose only for and during the term of ten years from the date hereof, and as much longer as Oil and Gas shall be found in paying quantities *on the premises*." (The italics are mine.) In consideration of *the grant and demise* the party of the second part agreed to give "the party of the first part one barrel of every ten barrels, or its equivalent in cash, of Petroleum obtained or produced on the premises herein leased", and "that if gas is found in sufficient quantities to utilize, the consideration in full to the party of the first part shall be 100 dollars per annum for each well yielding gas in paying quantities, or capped, the first payment to be made in three months from the completion of the well, and the privilege of using enough to heat dwelling, if any, on said premises, as soon as pipe line is laid along the road in front of the house."

The agreement further provided that the party of the first part granted to the party of the second part "the right of using sufficient water for all necessary purposes, from the premises hereby leased, except from wells on said lands, the right of way over and across said premises, the exclusive right to lay pipes to convey Oil and Gas, and the right to bring upon, erect and remove any machinery or fixtures required by the party of the second part", and that "this lease shall be null and void unless the said party of the second part shall pay to the party of the first part one dollar per acre per annum until the completion of a well on the said premises." All conditions made between the parties were made to extend to their heirs, executors and assigns.

The rights of the Beaver Oil & Gas Company Limited have since, by virtue of subsequent assignments, become vested in

the Dominion Natural Gas Company, Limited, which takes no part in these proceedings.

Two gas wells were brought into production on the west half of lot 190 before the expiration of the ten-year period provided for in the lease, and these continue in production. No producing wells have been drilled on the east half of the west half of lot 28.

The tract of land referred to in the lease was a farm consisting of 125 acres owned and operated by the lessor, who died intestate on or about the 2nd August 1939. Letters of administration *de bonis non* of his estate were granted to Floyd Woodrow Dawson, a son, on the 5th April 1943. The deceased left him surviving, his widow, two sons and three daughters as his only heirs-at-law. The widow died intestate on the 27th December 1942, leaving the aforementioned sons and daughters as her only heirs-at-law. Under the provisions of s. 12 of The Devolution of Estates Act, R.S.O. 1937, c. 163, the title to the land in question, subject to the lease, vested in the heirs-at-law as tenants in common on the 2nd August 1942.

By an agreement arrived at among the heirs-at-law, the appellant, Douglas Laird Dawson, one of the heirs-at-law, acquired title to the portion of the farm described as lot 190, comprising 75 acres, more or less, and paid therefor, together with an additional piece of property not involved in this appeal, the sum of \$6,750. The respondent Helen Lucille Bell, another heir-at-law, likewise acquired title to the east half of the west half of lot 28, comprising 50 acres, more or less, and paid therefor \$2,500. The dwelling-house and farm buildings are situated on lot 190. There are no buildings on lot 28. The appellant and the other heirs-at-law (except the respondent) joined in the conveyance to the respondent, and likewise the respondent and the other heirs-at-law (except the appellant) joined in the conveyance to the appellant. Each conveyance was in the form of an administrator's deed without covenants (except the covenant that the grantors had done no act to incumber), but each contained a release to the grantee of all claims of the grantors upon the lands therein described. There were no reservations in the deeds.

The neat question for decision in this appeal is whether the respondent, as owner of the 50 acres conveyed to her, is entitled to any share in the money paid and the gas supplied under the

terms of the lease entered into between John Fletcher Dawson and The Beaver Oil and Gas Company Limited, and if so what share? The learned trial judge held that the respondent was entitled to a proportionate share of the money paid under the lease based on the proportion that the acreage of that part of the farm acquired by her bore to the whole, and that the value of the gas supplied to the appellant for domestic purposes should be valued and the value be likewise apportioned.

In determining the rights of the parties it is a first essential to consider the legal rights conferred on the lessee under the lease, and what rights attached to the land owned by the deceased at his death, for which compensation was to be paid to him, his heirs, executors and assigns.

The estate granted under the lease was an exclusive and continuing right extending to the whole of the demised farm, to enter upon the land and occupy it for the purpose of "drilling and operation for Petroleum Oil and Gas", for a period of ten years and for such further term as oil and gas might be produced thereon. There is in addition a right to use water for necessary purposes, which may be taken from any portion of the lands, except the wells on the lands, and an exclusive right of way to lay pipes and move machinery on any portion of the land. In case the lessee recovers oil or gas it becomes the property of the lessee with full liberty to remove it from the demised lands. There is no doubt that the lands of the respondent, as well as those of the appellant, are burdened with the rights conferred on the lessee under the lease. In return for the rights conferred the lessee agrees to pay compensation fixed at one dollar per acre until the completion of a well on the premises. If an oil well is completed, the compensation is based on the flow of oil. If a gas well is completed, the compensation is based on the number of gas wells yielding gas in paying quantities, and in addition thereto "enough gas to heat dwelling on premises".

It is well established in English law that a mining lease "is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil": *Gowan v. Christie et al.* (1873), L.R. 2 H.L. Sc. 273, per Lord Cairns at p. 284; *Coltness Iron Company v. Black*, 6 App. Cas. 315, per Lord Blackburn at p. 335. In *McIntosh v. Leckie* (1906), 13 O.L.R. 54, Boyd C. held

that a gas lease, not dissimilar to the lease here in question, was more than a mere licence, and that it conferred an exclusive right to conduct operations on the land in order to drill for and produce the subterranean oil and gas which might be found during the specified period. "It is a *profit à prendre*, an incorporeal right to be exercised in the land described." The same views were expressed by Meredith C.J.C.P. in *Canadian Railway Accident Co. v. Williams* (1910), 21 O.L.R. 472. These cases follow and apply to oil and gas leases the principles set out in *Duke of Sutherland v. Heathcote*, [1892] 1 Ch. 475, particularly at 483, where Lindley L.J. states: "A right to work mines is something more than a mere licence: it is a *profit à prendre*, an incorporeal hereditament lying in grant. The distinction between a licence and a *profit à prendre* was pointed out in *Wickham v. Hawker et al.* (1840), 7 M. & W. 63, 78, 151 E.R. 679, a leading case on rights of sporting."

It is therefore clear that, according to our law, the right granted under the lease here in question is more than a licence of limited occupancy, and is a right to enter upon and occupy the whole farm for the purposes named therein and to recover and take away oil and gas, which, until they are liberated from confinement by the soil, form part of the soil. It is a *profit à prendre* in gross, an incorporeal hereditament, which is an estate in the whole land and which will continue to exist, unless otherwise terminated, as long as oil or gas is produced under the provisions of the lease. As to the nature of the estate, see *Martyn v. Williams* (1857), 1 H. & N. 817 at 826, 156 E.R. 1430; *Webber v. Lee* (1882), 9 Q.B.D. 315; *Shuttleworth v. LeFleming et al.* (1865), 19 C.B.N.S. 687 at 709, 144 E.R. 956.

There can be no doubt that had the lessor, within the ten-year period and prior to the completion of a well, divided the farm, as it subsequently was divided, the appellant and the respondent would have been entitled to an apportionment of the money received as consideration for the lease. I fail to see why in such case the law laid down in Redman's Law of Landlord and Tenant, 8th ed. 1924, p. 451, and Woodfall's Law of Landlord and Tenant, 25th ed. 1939, p. 332, would not apply and why the right to receive the proportionate part of the rent would not pass to the respondent under the grant of the land to her according to the provisions of The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, s. 14(10).

That being so, are the rights of the parties altered by the fact that two producing gas wells were completed prior to the division of the freehold? As I interpret the lease, no new rights accrued to the lessee following the completion of a well, except the extension of the term of the lease, but a different measure of payment for those rights was provided. The lessee's right to remove oil or gas, if found, remains the same. Prior to the completion of a gas well the measure of compensation was fixed by the number of acres leased. Following the completion of a well the measure of compensation was fixed at \$100 per annum for each well yielding gas in paying quantities and free gas for the dwelling-house on the premises, or in the case of a producing oil well being completed the measure of payment was one barrel in ten, or its equivalent, for every barrel of oil obtained on the premises. I think the compensation might just as well have been fixed by the number of wells drilled on any other property if the parties had so agreed.

I do not think the amount paid for these privileges can under the English law be considered the purchase price of a chattel, *viz.*, gas or oil when the same has been severed from the realty at the head of the well, as is suggested in some of the American cases. It is the compensation that is paid for the right to exercise the privileges conferred under the lease. The land conveyed to the respondent was subject to the exercise of those rights and will continue to be subject to the exercise of those rights as long as gas is produced in paying quantities anywhere on the 125-acre tract demised.

The compensation payable under the lease is referred to in popular language as a royalty; the nature of a royalty payable under leases that, in my opinion, do not differ in principle from the lease here being considered, has been well decided by English law.

In *Reg. v. Westbrook*; *Reg. v. Everist* (1847), 10 Q.B. 178, 116 E.R. 69, Lord Denman C.J. was called upon to decide what was the legal nature of a royalty derived from a lease of land held for the purpose of getting clay to make bricks. The royalty was fixed at £2 per acre and 2s. 6d. for every 1,000 bricks moulded in a year. It was argued that it was altogether wrong in principle to consider the royalty as rent. This argument was founded on the contention that it is a sum paid not in respect of renewing produce of the land but a *portion of the land itself*

(the italics are mine), and that not consumed by slow degrees and to be exhausted at the end of a long period, as in the case of a coal mine, under which circumstances it was admitted that it might be treated as produce, but in such large proportions that the whole would in a few years be exhausted. Lord Denman says at p. 203: "It does not appear to us that the circumstance of a more or less rapid consumption can make any difference in the principle."

And at p. 204: "We come, then, to the bare objection that the royalty is paid, not for the renewing produce of the land, but for several portions of the land itself, mixed with foreign matter; the expense of this, however, must of course have been cast off before the royalty itself was fixed. That was a sum which, after all such expenses paid, the occupier could afford to render to the landlord. When the case is thus laid bare, there is no distinction between it and that of the lessee of coal mines, of clay pits, of slate quarries: in all these the occupation is only valuable by the removal of portions of the soil; and whether the occupation is paid for in money or kind, is fixed beforehand by the contract, or measured afterwards by the actual produce, it is equally in substance a rent: *it is the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows.*" (The italics are mine).

In *Daniel v. Gracie* (1844), 6 Q.B. 145, 115 E.R. 56, Lord Denman held that where an agreement provided that the plaintiff should take a certain marl and slack pit and pay yearly 8d. per yard for all the marl and slack, and the right to work a brick mine and pay 1s. 8d. per 1,000 for all bricks made, the owner of the land had the rights of a landlord and was entitled to distrain for rent.

In *Coal Commission v. Earl Fitzwilliam's Royalties Company et al.*, [1942] Ch. 365, [1942] 2 All E.R. 56, Bennett J., at p. 374, said: "In *The Queen v. Everist* [*Reg. v. Westbrook, supra*] it was decided by the Court of Queen's Bench that a royalty is a true rent".

Counsel for the appellant argues that notwithstanding that the respondent's land is burdened with the lease and the rights granted thereunder, the respondent is to be entitled to no compensation for the burden imposed on her land, unless and until the lessee may choose to complete a gas or oil well thereon. To admit this argument is to deny that the royalty is rent, and

to hold that upon the division of the freehold the *profit à prendre* in a sense became severed, and the lessee held the same on terms to pay to the owner of the 75 acres the whole compensation therefor, while precisely the same rights were held from the owner of the 50-acre block, for which the lessee is liable to pay no compensation, unless and until a producing well is brought in on her property. So to hold, in my opinion, would be inconsistent with the terms of the lease and with long-established principles of English law. The money paid is the consideration for the right to enter upon the land and drill for oil or gas and to take away the same when it is recovered, as distinct from the purchase price of oil or gas reduced to possession.

The appellant, in an able argument, relied strongly on certain decisions in the courts of States of the United States of America. These decisions are only useful in so far as they may expound the law consistently with the principles of English law, and in this light I have given them careful consideration. There are two conflicting lines of authorities, one holding that when there has been a transfer of a part of the leased premises the transferee, in the absence of a contract to the contrary, is entitled to all royalties accruing from producing wells on the portion transferred, and not to a *pro rata* interest in the royalty from production on the part not transferred. The other line of authorities held that royalties should be apportioned according to the proportion that the area of the part of the land transferred bears to the whole of the leased premises. Thornton on Oil and Gas, 5th ed. 1932, vol. 2, p. 669, adopts the former proposition, but points out that contrary views have been expressed in a number of cases. I have read with care all the decisions cited by the author for both propositions, in an effort to reconcile one or the other with the underlying principles of English law, and to ascertain the fundamental principle on which they differ. I have come to the conclusion that the difference of opinion in the American courts flows from the views held by the respective courts on the nature of the rights granted under the lease.

In the States of Pennsylvania and Texas, the Courts have consistently held that the purchaser or the devisee of a part of land subject to a gas and oil lease is entitled to a proportionate share of the royalty payable under the lease: *Wettengel v. Gormley* (1894), 160 Pa. 559; *Wettengel et al. v. Gormley et al.* (1898), 184 Pa. 354; *Gillette v. Mitchell et al.* (1918), 214 S.W. 619;

McRae et al. v. Japhet et al. (1925), 269 S.W. 829; *Hoffman et al. v. Magnolia Petroleum Co. et al.* (1925), 273 S.W. 828.

In Ohio, West Virginia, Oklahoma, Arkansas and Kentucky, the Courts have held that upon partition of a tract of land subject to an oil and gas lease, the royalties are not apportioned, but the right there passes with the conveyance of the land on which the wells are situate: *Northwestern Ohio Natural Gas Co. v. Ullery* (1903), 67 N.E. 494; *Pittsburgh & West Virginia Gas Co. v. Ankrom et al.* (1918), 97 S.E. 593; *Musgrave v. Musgrave et al.* (1920), 103 S.E. 302; *Pierce Oil Corporation v. Schacht et al.* (1919), 181 Pac. 731; *Osborn et al. v. Arkansas Territorial Oil and Gas Co.*, 146 S.W. 122; *Hurst et al. v. Paken Oil Co. et al.* (1941), 152 S.W. (2d) 981.

I have come to the conclusion that the cases in support of the latter proposition are dependent on the adoption of a principle that cannot be reconciled with English law. As I read these cases, the Courts proceed on the principle that the *absolute* ownership of the oil or gas under a tract of land subject to an oil and gas lease is in the owner of the land, and that what the lessee holds is a licence to go on the land and reduce the oil or gas to possession, whereupon it becomes a chattel and his property. On this theory, the royalty is the purchase price of a chattel reduced to possession on the land of another under licence. In *Northwestern Ohio Natural Gas Co. v. Ullery*, *supra*, Burket C.J., at p. 495, said:

"In any view that may be taken of this case, the question comes back to the point as to whether the lease is entire, and the lands and rental of gas wells invisible". After pointing out that oil and gas in place is part of the realty, he goes on to follow a quotation from *Kelley v. The Ohio Oil Company* (1897), 57 Ohio St. 317 at 328:

"Petroleum oil is a mineral, and while in the earth it is part of the realty, and should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and if it moves to the next adjoining tract, it becomes part and parcel of that tract; and it forms part of some tract, until it reaches a well and is raised to the surface, and then for the first time it becomes the subject of distinct ownership separate from the realty, and becomes personal property, the property of the person into whose well it came. And this is so whether the oil moves, percolates, or

exists in pools or deposits. In either event, it is property of, and belongs to, the person who reaches it by means of a well, and severs it from the realty and converts it into personalty."

The judgment in the *Ullery* case is finally based on a construction of the special wording of one of the documents in question, and concludes: ". . . it is clear that the owner of the 40-acre tract, upon which the well is situated, is entitled under this last extension *to the rental of \$150 each year for that well*". (The italics are mine.)

No reason is given for referring to the payment of \$150 as rental for the well in question, as distinct from a payment for rights of occupation exercised over the whole tract of land covered by the lease, and such a conclusion is quite inconsistent with the statement of Lord Denman in *Reg. v. Westbrook*, *supra*.

I do not think that the royalty provided under the lease we have to consider can in any sense be interpreted to be rental for the gas wells sunk on the 75-acre portion of the farm.

The decisions of the West Virginia Courts have been widely conflicting. In *Campbell et al. v. Lynch et al.* (1918), 94 S.E. 739, Poffenbarger J., writing the majority judgment of the Court, held that, in substance and effect, a royalty under a gas lease is rent and, if the lessor sells part of the land subject to the lease, it must be apportioned. It was held that a lease vests in the lessee an *estate in the land*, but not title to the oil or gas. This is consistent with English law. Ritz and Miller JJ. dissented. The same point came before the West Virginia Court in 1918 in *Pittsburgh & West Virginia Gas Co. v. Ankrom*, *supra*, and again in 1920 in *Musgrave v. Musgrave*, *supra*, when the majority of the Court, which included the dissenting judges in *Campbell v. Lynch*, reversed the opinions held in *Campbell v. Lynch*, Poffenbarger J. and Williams C.J. dissenting. A very strong dissenting judgment was written by Poffenbarger J. in which he deals with the question that is fundamentally involved in the decision necessary to this appeal. Many English authorities are referred to and analyzed, as they were by the same judge in *Campbell v. Lynch*. From these judgments I get much more assistance in the interpretation of the English law than I do from the judgments holding contrary views. Ritz J., in writing the main judgment of the Court in *Musgrave v. Musgrave*, states:

"No oil or gas had been found at that time [*i.e.*, at the death of the testator], and the only interest that the lessee had in the

property was a mere right to go upon it and prospect for oil and gas. The oil and gas underlying the property were owned *absolutely* by John J. Musgrave [the lessor]." (The italics are mine).

I cannot reconcile this decision with the decisions of our Courts and the English Courts that the lessee in such cases held a *profit à prendre*, an incorporeal hereditament, which is an estate in land and not a mere licence. There is no reasoning in the other American cases referred to, which hold that the royalty in cases of partition of the land subject to the lease should not be apportioned, which throws any further light on the problem.

In the first case of *Wettengel v. Gormley, supra*, the decision was the unanimous opinion of five judges of the Court of Appeal of the State of Pennsylvania. It was decided that royalties derived under an oil and gas lease in terms almost identical with the one here in question should be apportioned among the devisees of the lessor in the proportions that their respective parcels of the devised land bore to the leased premises. The case was brought before the Pennsylvania Court of Appeal again four years later, when the Court adhered to the former decision. In the first case, it was held that the legal effect of the lease was "a sale of the oil, for the removal of which, the surface, and sub-surface, were subject to the necessary servitudes." The opinion continued:

"The subsequent division of the body of land by the lessor could not divide or diminish the privilege of the lessee . . . [He] may locate his wells where he pleases, regardless of the interests of the devisees of his lessor."

Williams J., at p. 362 of the latter report of the case, states:

"But Gormley made a will, by the terms of which he severed the six hundred acres into three tracts or farms, and devised one of these to each of his three children. They took the title precisely as the testator held it, subject to all the provisions of the lease. As between themselves, the division of the surface was absolute; but as to the holder of the leasehold, each took the part devised to him, subject to the common burden which had been put upon the entire body of the land as a single undivided tract containing six hundred acres, more or less. As the lease covered all the land, so the rent may be said to issue from each and every part of it. The royalties belonged to the owners of

the six hundred acres, and not to the owner of any subdivision of it. . . . The children hold together all the acreage that is covered by the lease, and each should receive such share of the royalty as his or her share of the land bears to the whole tract covered by the lease. It does not matter in what acre or hundred acres the wells may be situated. The royalties are not payable by the acre, nor by the farm into which the surface may be divided, but upon the total production, wherever within the six hundred acres the production may take place."

I think these views are entirely consistent with the English law.

I can find nothing in the reasoning of the American Courts that take a contrary view from the conclusion to which I have come to warrant me in departing from the principles of English law which so clearly establish that a royalty is compensation for the right to occupy land, and that in its essence it is rent, and, being rent, must necessarily be apportioned among the owners of the separate parts of the freehold. I have, therefore, come to the conclusion that the learned trial judge was right in holding that the royalty of \$200 a year payable under the lease should be apportioned in proportions of 75/125 and 50/125.

It was argued that the respondent, having released all her interest in the 75-acre block of land on which the gas wells were situated, could not now claim any portion of the royalty. I do not think that the releases, contained in the conveyances to the appellant and respondent respectively, affect the matter. The respondent did not release any rights that arose under the lease by virtue of the ownership of the 50-acre block acquired by her, while on the other hand, the appellant and all other heirs-at-law released to the respondent any interest that they might have arising out of the ownership of the respondent's land.

With the utmost respect, I am unable to agree that the gas supplied to the dwelling-house on the 75-acre farm owned by the appellant should be valued and likewise apportioned. The right under the lease was "the privilege of using enough [gas] to heat dwelling, if any, on said premises, as soon as pipe line is laid along the road in front of the house." This is clearly a right appurtenant to that part of the land on which the house stands. When the respondent joined in a conveyance in which she released to the appellant all her claims on the lands conveyed,

it carried with it any claim to the gas which was supplied as an appurtenance to the house erected on the land described in the conveyance. This disposition of this part of the appeal involves considerations entirely different from those which apply to the money paid under the lease. There should, therefore, be no apportionment of the value of the gas supplied to the dwelling-house on the land occupied by the appellant.

I would allow the appeal in part and direct that the judgment of the learned trial judge be amended by striking out para. 2 and substituting a paragraph declaring that the respondent has no interest in the gas supplied to the dwelling-house or houses on the property conveyed to the appellant.

As success is divided I would make no order as to the costs of the appeal.

Appeal allowed in part, LAIDLAW J.A. dissenting in part.

Solicitor for the appellant: Ralph D. Steele, Chatham.

Solicitors for the respondent: McNevin, Gee & O'Connor, Chatham.

Solicitors for Dominion Natural Gas Company, Limited: Simpson & Duncan, Hamilton.

[COURT OF APPEAL.]

Bell v. Williamson and Moulton.

Fraudulent Conveyances—Status to Maintain Action to Set Aside—Necessity for Showing Valid Claim in Plaintiff—Inferring Intention to Defraud—The Fraudulent Conveyances Act, R.S.O. 1937, c. 149, s. 2.

Before a conveyance can be set aside, under s. 2 of The Fraudulent Conveyances Act, as being made with intent to defeat or delay creditors, it is essential that the plaintiff in the action should establish by evidence that he has a valid claim against the transferor, since it is only as against persons having such claims that the transaction is null and void. It is true that the plaintiff need not have reduced his claim to judgment, and that the transaction may be declared null and void as against him even if he has, at the time of the transaction attacked, and even at the time of bringing his action, only a claim for unliquidated damages in contract or in tort; the effect of the words "or others" following the word "creditors" in s. 2 is to give such a person a right of action if the transaction is made with the required intent. It is probably sufficient, also, for the plaintiff to allege in his statement of claim that he is one of the class of "creditors or others", but when the action comes to trial, the truth of this allegation, like that of any other material allegation that is neither presumed in the plaintiff's favour nor admitted, must be established by evidence.

Judgment of Plaxton J., *ante*, p. 484, affirmed on different grounds.

AN APPEAL by the plaintiff from the judgment of Plaxton J., *ante*, p. 484, [1945] 4 D.L.R. 253, dismissing the action.

2nd and 3rd October 1945. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and GREENE JJ.A.

R. A. MacDougall, for the plaintiff, appellant: The trial judge erred in finding that there was no evidence of fraud or of an intention to defeat creditors; the sequence of events alone, as set out in the evidence adduced at the trial, raises an overwhelming presumption of fraud and intention to defeat and delay creditors. The conveyance and bill of sale are voluntary, and accordingly the burden is on the respondents to prove that there was no such intent as is contemplated by s. 2 of The Fraudulent Conveyances Act, R.S.O. 1937, c. 149. The trial judge wrongly placed the burden of proof on the plaintiff, when it should have rested on the defendants: *Goodwin v. Williams* (1856), 5 Gr. 539; *Buckland v. Rose* (1859), 7 Gr. 440.

The conveyance and bill of sale are expressed to be made in consideration of natural love and affection. The covenants in the conveyance show an evident attempt to build up a valuable consideration, but they do not in fact constitute such a consideration. The grantees covenant only to pay taxes and other current charges on the farm which becomes their property, and

to support, and pay medical and funeral expenses for, an aged father, which obligation they were in any event bound to perform under The Parents' Maintenance Act, R.S.O. 1937, c. 212. The bill of sale does not contain even these covenants.

[ROBERTSON C.J.O.: Is there any evidence at all to prove that the plaintiff was a creditor?] The trial judge held that the plaintiff, on making a slight amendment to the style of cause, had sufficiently established a status entitling her to sue on behalf of herself and all other creditors of Andrew Dunn: *Hopkinson v. Westerman* (1919), 45 O.L.R. 208, 48 D.L.R. 597. [ROBERTSON C.J.O.: It is an essential part of your case that you should prove your status.]

The evidence offered to support the transaction, and as to the intent of Andrew Dunn at the time, is not sufficient corroboration within the decision in *Koop v. Smith* (1915), 51 S.C.R. 554, 25 D.L.R. 355, 8 W.W.R. 1203.

The evidence shows that the intention of the defendants (who managed the transaction from first to last) was not actually to meet the situation which they claimed to be meeting. We rely on *Anderson v. Bradley* (1921), 51 O.L.R. 94, 64 D.L.R. 707, where the facts were somewhat similar.

I. Levinter, K.C. (J. H. Clark, K.C., with him), for the defendants, respondents: The conveyance and bill of sale were made for good consideration, and there is no evidence that there was any intent to defeat, hinder, delay or defraud creditors or others, or that they had this effect. The plaintiff has not satisfied the onus on her, and there is a definite finding by the trial judge in our favour on this issue. There must be proof of an actual intent to defraud, and the purchaser must be privy to that intent: *Hickerson v. Parrington* (1891), 18 O.A.R. 635.

There was valuable consideration: *Campbell v. McDonell* (1927), 33 O.W.N. 246; *Doe d. Keith v. Corey* (1890), 29 N.B.R. 287 at 293.

The plaintiff has not established that she has the status necessary to maintain this action. She did not, by the evidence at the trial, bring herself within the words "creditors or others" in s. 2 of The Fraudulent Conveyances Act. It was proved at the trial that there were no creditors of Andrew Dunn.

R. A. MacDougall, in reply.

Cur. adv. vult.

13th November 1945. ROBERTSON C.J.O.:—This is an appeal by the plaintiff in the action from the judgment of Plaxton J., dated 17th May 1945, whereby the action was dismissed with costs, after the trial of the action at Woodstock.

The judgment of Plaxton J. is reported in [1945] O.R. 484, [1945] 4 D.L.R. 253. A statement of the issues in the action, and the parties to it, and of the material facts, sufficiently appears in that judgment, so that I need not set them forth here. There were, broadly, two main issues: the first, as to the status of the appellant to maintain the action; the second, whether, upon the evidence, the transaction attacked was a fraudulent one in the sense that it was made with intent to defeat, hinder, delay or defraud creditors or others, within the meaning of s. 2 of The Fraudulent Conveyances Act, R.S.O. 1937, c. 149, and therefore null and void as against such persons and their assignees. The judgment of the trial judge is in favour of the appellant on the first issue, and in favour of the respondents on the second.

With every respect for the opinion of the learned trial judge, I have grave doubt whether, if the appellant was entitled to succeed on the first issue, as the trial judge held, she was not also entitled to succeed on the second. James Hugh McKenzie, whom the appellant represents as his executrix, and Andrew Dunn, against whom McKenzie alleged he had a claim, and who transferred all his property to the respondents, were both alive at the time of the transaction now under attack. Andrew Dunn and the respondents all knew, before the transfer of Dunn's property was made, but while it was in contemplation, that McKenzie was putting forward a claim, for at least as much as \$750. Without admitting that McKenzie had any valid claim, the respondents offered to pay McKenzie the sum of \$750, but demanded that upon payment of that sum McKenzie should sign a release of all claims against Dunn. This, McKenzie refused to do. The contemplated transfer of all Dunn's real and personal property to the respondents was thereupon carried out without McKenzie's knowledge, and Dunn was left without any property out of which McKenzie could recover any valid claim he might have.

There is enough in these facts to call upon the respondents to justify the transaction, and I am not wholly satisfied that they have made good their defence. I am of the opinion that the

respondents were permitted to put in at the trial a good deal of evidence of conversations and statements that were not properly admissible, with a view to showing absence of intent to defraud, and the result of the trial may have been affected by such inadmissible evidence.

It is, obviously, difficult to determine whether or not a transfer of property was made with intent to defraud someone who alleges he had a claim against the transferor, until it appears whether or not there was in fact any rightful claim, and whether or not the parties to the transaction are chargeable with notice of the claim, and knew that it was, or might reasonably be expected to be proved to be, a valid claim. An intent to defraud does not exist in the abstract. The learned judge held, without evidence of the existence of any rightful claim by McKenzie against Dunn, that he was bound to assume that McKenzie had in fact such a claim. In this, with respect, I think the trial judge erred.

All that can be said, therefore, in regard to the question of fraudulent intent upon the evidence in this case is that there is evidence that, in my opinion, went a long way to support a finding of an intent to defeat McKenzie's claim, had the evidence established that McKenzie in fact had a good claim. The nature of the claim, if any claim had been established, and its amount, and whether Dunn and the respondents should be taken to have had knowledge that a valid claim existed, are all matters that would enter into consideration in forming the final conclusion as to intent to defraud. In the absence of evidence of any of these matters, it is impossible to charge either Dunn or the respondents with an intent to defraud McKenzie, notwithstanding the significance of respondents' change of attitude towards a settlement, after all Dunn's property had been conveyed to them.

I am quite unable to agree with the opinion of the learned trial judge that the appellant could support her action to set aside the transaction attacked in this action, without proof that McKenzie had a rightful claim against Dunn, which is vested in the appellant as his executrix, and which she is entitled to enforce. Whether the claim was in contract or in tort, and for a debt or for damages, without proof of some valid claim against Dunn, she is not entitled to set aside the transaction by which Dunn transferred all his property to the respondents. It is not

enough for her merely to say that she has a claim, without proof of it. The statute makes a conveyance null and void only against creditors or others entitled to just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures in respect of which there is an intent to defeat, hinder, delay or defraud them. As against the transferor himself and all other persons, the transfer is good. It would be a strange state of affairs indeed if the appellant should now be given in this action a judgment declaring the transaction in question fraudulent and void, and later, in the other action pending, she should fail to prove that she was entitled to any claim whatsoever. It was no business of the appellant what Dunn did with his property, unless she could prove a claim against him.

I do not doubt for a moment that a transaction may be null and void within s. 2 of The Fraudulent Conveyances Act, although the plaintiff who brings the action attacking it may, at the time of the transaction, and even when action is brought attacking it, have had nothing more than a claim for unliquidated damages in contract or in tort. The effect of the words "or others" following the word "creditors" is to give to such persons a right of action to have a transaction set aside as null and void as against them, if made with the required intent. An allegation in the statement of claim in such an action that the plaintiff is one of the class of "creditors or others" to whom a right of action is given by the statute is, doubtless, sufficient in the pleading. But when he comes to trial the plaintiff must establish the truth of that allegation by evidence, like every other material allegation that is neither presumed in his favour nor admitted.

The learned trial judge, in the course of discussions at the trial, said, more than once, that he was bound to assume that McKenzie was a creditor, or that there was some kind of claim. He refused to permit counsel for the respondents to adduce evidence to prove that there was no claim. He said that was in issue in another action that was not before him. In giving judgment he again dealt with the matter, and cited a number of decided cases, giving prominence to *Hopkinson v. Westerman* (1919), 45 O.L.R. 208, 48 D.L.R. 597. It is plainly stated in the judgments in that case, as reported, and therefore must have been in evidence, that the plaintiff had recovered judgment for \$1,100 in an action for criminal conversation that was pending

at the time of the alleged fraudulent transaction. This fact being in evidence, there was no ground for the Court even considering, in that case, what the position would have been had the plaintiff given no proof of a valid claim in existence at the time of the transaction, and the judgments say nothing about such a situation. What the case does decide is that where the plaintiff's claim is for damages for tort, it is not necessary that the claim should have passed into a judgment at the time of the transaction alleged to be fraudulent. Such a plaintiff comes within the words "creditors or others" used in the statute. Likewise, in *Shephard v. Shephard*, 56 O.L.R. 555, [1925] 2 D.L.R. 897, also cited by the learned trial judge, there was, at the time of the transaction under attack, an action for alimony pending against the transferor. The alimony action was not defended, and a judgment for payment of alimony was entered against him. The action to set aside the alleged fraudulent transaction was not begun until some months later. All of this appears in the report, and the objection raised as to the status of the plaintiff appears to have been that a wife, having no claim except under a judgment for alimony, could not bring the action. It was held that she had the necessary status, although, in the final result, it was held that a case, bringing the transaction attacked within the statute, had not been made out.

McMullen v. Dr. Barnardo's Homes National Incorporated Association (1924), 26 O.W.N. 168, also cited by the learned trial judge, was an interpleader issue. The Association had issued execution against the transferor and, seizures being made by the sheriff thereunder, transferees of the execution debtor claimed the property seized, and an issue was directed in which the Association attacked the transfers as fraudulent. As matter of course, there was no question here of the status of the Association. It had judgment and execution. *Hopkinson v. Westerman*, *supra*, is referred to and followed as deciding what I have already stated.

Gay Co. Ltd. v. Trick (1927), 31 O.W.N. 445, was a motion to dismiss an action seeking to set aside a transfer of property as in fraud of creditors and others. The principle of *Hopkinson v. Westerman* was applied. The plaintiffs, who had sued as execution creditors, but whose judgment had been set aside and a new trial ordered, were allowed to amend their proceedings

so as to sue on behalf of themselves and other creditors. The case has nothing to do with evidence.

Longeway v. Mitchell (1870), 17 Gr. 190, is referred to in the extract from the judgment of Middleton J.A. in *Hopkinson v. Westerman*, quoted by the trial judge, as laying down the principle upon which the latter case proceeded. In the *Longeway* case the point arose on demurrer. The plaintiffs attacking the transaction there in question had alleged in the bill that they were simple contract creditors of one Watson, who, it was alleged, had absconded to the United States, but before leaving had made a voluntary conveyance of certain lands to the defendant Mitchell, with intent, on the part of both of them, to defeat, delay and defraud the plaintiffs and other creditors of Watson. The objection taken by demurrer was that a simple contract creditor who had not sued out execution, nor even recovered judgment for his claim, could not maintain the action. The demurrer on this point was overruled, and it was held that it was not necessary for the plaintiff to allege that he had carried his claim to judgment. This case, of course, does not decide anything as to what must be proved at the trial. It is a case on the pleadings only, but it does decide the principle of law applied in the later cases.

In the leading case of *Reese River Silver Mining Co. v. Atwell* (1869), L.R. 7 Eq. 347, upon which the decision in *Longeway v. Mitchell*, *supra*, is founded, and which definitely established the principle stated in *Hopkinson v. Westerman*, *supra*, and in many other cases, although a claim against Atwell (afterwards established) existed when the proceedings were commenced attacking the transaction alleged to have been carried out with intent to defraud creditors and others, the claim had not then become the subject of any order or judgment against Atwell. Before the hearing, however, an order for payment was obtained. No question arose in that case that the claim had not been proved. The objection raised was that the action could not be maintained by one who had no order for payment or judgment, to begin with, in spite of the fact that prior to the hearing the claim was evidenced by an order or judgment for payment.

None of the cases cited in the judgment supports the proposition that it is unnecessary, at the trial of such a case as this, that the plaintiff should prove that he has the status essential to

maintain the action, and that it is to be assumed, without proof, that he has in fact a valid claim such as entitles him to sue. They concern quite another question.

If this were a case in which the omission to give evidence at the trial of the fact of the claim of the deceased McKenzie was due wholly to a slip, through oversight or mistake, and the fact itself were not substantially in dispute, some way might be found by which the appellant would be given an opportunity to supply the necessary evidence—perhaps by affidavit—somewhat as was done in *Doty v. Marks*, 55 O.L.R. 147, [1924] 3 D.L.R. 687. That, however, is not by any means the situation. There is serious dispute of any indebtedness, and, both principals being dead, it is doubtful if satisfactory evidence is available to establish any claim. It seems unlikely that evidence by affidavit would, in any event, meet the proper requirements. A new trial on any proper terms as to costs would involve the appellant in the immediate disbursement of more money than her chances of recovery may be worth. Appellant's counsel did not come forward with any proposals on his part to meet the situation, any suggestions in that regard coming from the Court. It may well be that the failure to put in evidence at the trial to prove that McKenzie had a valid claim arose primarily from the impossibility of finding any sufficient evidence, and that the same situation would present itself again, if the case were re-opened. I find it difficult to think that the able and experienced counsel for the appellant, whatever may have been his views on the need for giving evidence of a claim, would have overlooked the support that would be added to his attack upon the transfer by Dunn of all his assets, by evidence of the existence of a valid claim on the part of McKenzie, of which valid claim Dunn would have had full knowledge, and the respondents express notice, before the transfer was made. In the circumstances, notwithstanding any doubts I may have as to the propriety of the conclusion of the learned trial judge as to the validity of the transfers of property to the respondents, if it is assumed that McKenzie had a valid claim against Dunn—as the learned trial judge considered that he was bound to assume—this is not a case where the appellant should be given another opportunity to complete her case by a new trial, or by any other method, and, on the case as it stands, she cannot succeed, as it does not appear that she has

the necessary status to impeach the transactions that are attacked.

The appeal should be dismissed, with costs.

HENDERSON J.A. agrees with ROBERTSON C.J.O.

GREENE J.A. died before the delivery of judgment.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: MacDougall & Whaley, Woodstock.

Solicitors for the defendants, respondents: Clark & Zeron, Windsor.

[COURT OF APPEAL.]

The Bell Telephone Company of Canada v. The Township of Harwich.

Drainage—Assessment of Public Utilities—Increase of Cost of Repairs to Existing Drain resulting from Construction and Operation of Public Utility—The Municipal Drainage Act, R.S.O. 1937, c. 278, s. 8(18), (19), (20).

Section 8(20) of The Municipal Drainage Act does not authorize the assessment of a public utility for the repair of an existing drain if the public utility owns no land in the municipality, derives no benefit from the drain, and has not been assessed for the cost of its original construction.

Per HENDERSON and LAIDLAW JJ.A.: There is no provision in the Act whereby any assessment can be made except against lands or roads, and a purported personal assessment of a company which owns no lands or roads in the municipality is a nullity. Nothing in subss. 18 to 20 of s. 8 (first enacted in 1923) alters the nature of the Act, and of the assessment provided for thereby, as expounded in *The Township of Chatham and North Gore v. The Township of Dover East and West* (1886), 12 S.C.R. 321; *Broughton v. The Township of Grey and The Township of Elma* (1897), 27 S.C.R. 495; and *The Sutherland-Innes Company v. The Township of Romney* (1900), 30 S.C.R. 495.

Per McRUE J.A.: The Act provides separately for the construction of new drains and for the repair of existing drains, and ss. 1 to 70 deal with original construction only, except where by direct language or clear implication they apply to repairs. Subss. 18 to 20 of s. 8 are sufficiently wide to permit the assessment of a public utility for the construction of a drain in the circumstances there outlined, even if the utility owns no assessable lands or roads, but they refer to construction only, and cannot be extended to justify an assessment for the cost of repairs to an existing drain, when the utility owns no assessable lands or roads in the municipality, and was not assessed in respect of the original construction.

Constitutional Law—Work for the General Advantage of Canada—Interference with Physical Structure of Bell Telephone System—The British North America Act, 1867, s. 92(10)(c)—The Municipal Drainage Act, R.S.O. 1937, c. 278, s. 8(18), (19), (20).

Per COUGHLIN Co. Ct. J.: The imposition by by-law of an assessment against The Bell Telephone Company of Canada (which has been declared to be a work for the general advantage of Canada) in de-

fault of an alteration (even temporary) in the physical structure of its lines and equipment, is beyond any power which the Legislature of a Province can delegate to a municipality. *Canadian Pacific Railway Company v. The Parish of Notre Dame de Bonsecours*, [1899] A.C. 367; *Madden et al. v. Nelson and Fort Sheppard Railway Company et al.*, [1899] A.C. 626, applied. (The Court of Appeal did not deal with this point.)

AN APPEAL by the Township of Harwich from the judgment of Coughlin Co. Ct. J., sitting at the request of the Drainage Referee, on an application to quash a by-law of the appellant. A trial was directed by the Referee, and after the conclusion thereof the following reasons for judgment were delivered:

12th January 1945. COUGHLIN Co. Ct. J.:—By the Dominion Act of incorporation of the plaintiff company, 43 Vict. (1880), c. 67, s. 3, it is authorized to construct, erect and maintain “its line or lines of telephone along the sides of . . . any public highways . . . in Canada . . . , provided that the Company shall not interfere with the public right of travelling on or using such highways . . . ; and provided that in cities, towns and incorporated villages the Company shall not erect any pole higher than forty feet above the surface of the street, nor affix any wire less than twenty-two feet above the surface of the street . . . without the consent of the Municipal Council having jurisdiction”.

By an amendment, 46 Vict. (1882), c. 95, s. 4, the works authorized by the original Act are declared to be for the general advantage of Canada.

The company, as part of the works so authorized, maintains a line of telephones along Highway No. 98, a public highway in the township of Harwich, being a connecting line with other lines in adjoining municipalities.

Under The Municipal Drainage Act, R.S.O. 1937, c. 278, the Municipality of the Township of Harwich has constructed a drain on the north side of said Highway No. 98, which, for a distance of about 7,560 feet, is parallel with and close to the line of poles from which the cable containing the telephone wires is suspended. For two-thirds of this distance the midspan height of the cable from the ground ranges from 14 feet to 17½ feet, and for the remaining one-third of the distance the range is from 7 feet to 10½ feet.

Owing to the telephone line being located at or about the northerly extremity of the road allowance, and to the drain being constructed between it and the paved portion of the high-

way, it does not interfere with the public right of travelling on or using the highway.

In the report of the Township Engineer, dated 25th August 1941, he estimated the cost of necessary repairs to this drain at \$1,035, "exclusive of railway culverts at the head of the drain and of the increase of cost of work caused by the construction and operation of a public utility".

With regard to the "public utility" above referred to, a subsequent paragraph of the report is as follows:

"Where the drain is along the county road known as the Gravel Road the cables of the Bell Telephone Company are too low to permit the operation of ordinary excavating equipment. It will be necessary to raise or move such cables during the work of excavation, and the cost of such raising or moving, being an increase of cost of the work caused by the construction and operation of a public utility, I assess against the Bell Telephone Company."

A somewhat similarly worded paragraph dealt with certain railway culverts to be constructed as part of the work, assessing their cost against the Pere Marquette Railway Company.

This report was adopted by by-law no. 3100 of the Township of Harwich, provisionally passed on the 15th December 1941, and finally passed on the 13th April 1942.

When the time came to construct the drain, the plaintiff herein, The Bell Telephone Company of Canada, refused to raise its cable or pay any part of the cost of the work, claiming that in so far as the by-law purported to impose any assessment on it the by-law was invalid for several reasons, the chief of which was that it was beyond the legislative power of the Provincial Legislature to authorize such an assessment against a company incorporated by the Dominion Parliament for a purpose declared by Parliament to be for the general advantage of Canada.

Thereupon the council of the Township procured a further report from its engineer, dated 10th August 1942, in which he recited that "The Telephone Company has refused to raise the wires and cables or to permit the Municipality or its contractors to do so." In this report he estimated the extra cost thereby occasioned at \$1,275, and assessed the whole of such cost against the company.

This report was adopted by by-law no. 3128, provisionally passed on the 29th August 1942, and, after an unsuccessful

appeal by the company against the quantum of assessment, finally passed on the 14th June 1943. The by-law imposed on the company annual rates representing the additional cost referred to in the report, and purported to amend the original by-law accordingly.

This by-law, and the rates imposed under it against the company, are the subject of the attack in these proceedings.

In my opinion the crucial question here is the one mentioned above as to the powers of the Provincial Legislature with respect to works declared by Parliament to be for the general advantage of Canada.

Under s. 8(20) of The Municipal Drainage Act (which subsection was first enacted in 1920), power is conferred on a municipal council to impose an assessment of the kind found here on all public utilities, which, by the interpretation section, would cover the telephone line and the railway affected by the report in this matter.

With respect to railways, no question of the jurisdiction of the Provincial Legislature can arise, by reason of the fact that by s. 270 of The Railway Act, R.S.C. 1927, c. 170 (which section was first introduced in its present form in 1903), railways are made subject to the drainage laws of the Provinces. Many provisions of the same Railway Act are also, by s. 375 of that Act, made applicable to telephone lines, but one of the sections expressly excluded is the above-mentioned s. 270.

Prior to the introduction of s. 270, relief as to drainage might be obtained through application to the Railway Committee of Parliament, but neither the Province nor any authority derived from the Province could pass any law affecting or interfering directly or indirectly with the physical structure of a Dominion railway. The two cases which went to the Privy Council and settled this question were *Canadian Pacific Railway Company v. The Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, C.R. [12] A.C. 145, and *Madden et al. v. Nelson and Fort Sheppard Railway Company et al.*, [1899] A.C. 626, C.R. [12] A.C. 224.

As the Bell Telephone Company is a work declared to be for the general advantage of Canada, it undoubtedly is entitled by the constitution to the same immunity from Provincial interference with the physical structure of its works as that possessed by Dominion railways. The *Madden* case, *supra*, holds that the

imposition of damages as the alternative for failure to alter the physical structure is an indirect interference with the physical structure, and therefore *ultra vires* of a Provincial Legislature. Applying that rule to the case in hand, here the imposition by the by-law of a rate in default of the telephone company altering (even temporarily) the height of its cable, is an indirect interference with the physical structure of an authorized Dominion work, and is beyond any power which the Legislature could delegate to the Township of Harwich.

It follows that by-law 3128, which imposes such a rate, must be quashed.

As this appears to be the first time this question has arisen with respect to companies other than railways, I do not think it is a case for the imposition of costs against the defendant.

By-law quashed.

12th and 13th September 1945. The appeal was heard by HENDERSON, LAIDLAW and MCRUER JJ.A.

J. R. Cartwright, K.C., for the appellant: Subss. 18 to 20 of s. 8 of The Municipal Drainage Act, R.S.O. 1937, c. 278, are *intra vires*, and empower the engineer to assess the respondent: *Canadian Pacific Railway Company v. The Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, C.R. [12] A.C. 145; *Reference re Validity of Section 31 of The Municipal District Act Amendment Act, 1941, Alberta*, c. 53, [1943] S.C.R. 295 at 303, [1943] 3 D.L.R. 145; *John Deere Plow Company Limited v. Wharton*, [1915] A.C. 330, 18 D.L.R. 353, 7 W.W.R. 706, 29 W.L.R. 917; *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, C.R. [9] A.C. 296, 4 Cart. 7. [HENDERSON J.A.: Is it your contention that because the telephone company has cables above the ground you are entitled to assess them?] The cases say that such works may be legally there, but that they are subject to any provincial taxing statute. [HENDERSON J.A.: The question of the amount of this assessment cannot be decided. The problem is whether there is a right to impose a tax of this kind upon this particular company.] The Province has such a power under s. 92(10) and (16) of The British North America Act: *Great West Saddlery Company Limited v. The King*, [1921] 2 A.C. 91 at 100, 58 D.L.R. 1, [1921] 1 W.W.R. 1034.

The respondent, by its conduct in appealing to the court of revision and the County Court Judge, is estopped from attacking the validity of the by-law: Proctor, *The Drainage Acts*, Ontario, 1908, pp. 85, 92.

C. R. Magone, K.C., for the Attorney-General for Ontario: In *Madden et al. v. Nelson and Fort Sheppard Railway Company et al.*, [1899] A.C. 626, C.R. [12] A.C. 224, relied on by the trial judge, the legislation was found to be *ultra vires* because it was railway legislation. There was no question of its being valid provincial legislation, but conflicting with Dominion legislation. The declaration, under s. 92(10)(c) of The British North America Act, that the respondent's work is one for the general advantage of Canada gives it no greater immunity from provincial legislation than that of any subject enumerated in s. 91: *Lymburn et al. v. Mayland et al.*, [1932] A.C. 318, [1932] 2 D.L.R. 6, 57 C.C.C. 311, [1932] 1 W.W.R. 578; Cameron, *The Canadian Constitution*, 1915, vol. 2, p. 40; *Montreal v. Montreal Street Railway*, [1912] A.C. 333 at 342, C.R. [1912] 1 A.C. 435, 1 D.L.R. 681, 13 C.R.C. 541, 10 E.L.R. 281.

The respondent did not obtain the consent of the municipality to the construction of its work, as required by s. 373(2) of The Railway Act, R.S.C. 1927, c. 170. This must be considered in dealing with s. 375 of The Railway Act, which makes many of the provisions of that Act applicable to telephone companies. Railways are subject to the drainage laws of the Provinces, by s. 270, but s. 270 is not among those made applicable to telephone companies.

Glyn Osler, K.C. (J. T. Garrow, with him), for the respondent: The Act of incorporation of the respondent company, 1880 (Dom.), c. 67, authorized it to construct, erect and maintain lines of telephone along the sides of any public highway in Canada, and to purchase other telephone lines, and its work was declared to be for the general advantage of Canada by 1882 (Dom.), c. 95. The Railway Act, R.S.C. 1906, c. 37, was in effect when we acquired the line here in question, and s. 248 of that Act required the consent of municipalities only where the lines were constructed in cities, towns or villages.

Our lines are not subject to the assessment here in question: *The City of Toronto v. Bell Telephone Company of Canada*, [1905] A.C. 52, C.R. [13] A.C. 361; *Great West Saddlery Com-*

pany Limited v. The King, supra. If the municipality cannot authorize direct interference with our structure, it cannot interfere indirectly as has been attempted here. [LAIDLAW J.A.: For an assessment to be lawful, there must be a property that is to be benefited.] In the absence of any such benefit, or liability, there is no authority to assess for contribution towards the cost of either original construction or repair, even if the legislation is valid: s. 2 of The Municipal Drainage Act; *In re Township of Harwich and Township of Raleigh* (1894), 21 O.A.R. 677.

The *Nelson and Fort Sheppard Railway case, supra*, held that the Legislature could not require a railway company either to change its work or to pay a tax, at the company's option, and that is precisely what has been attempted here. [McRUER J.A.: Would it make any difference if no choice were left to the respondent?]

Before the original enactment of s. 270 of the Dominion Railway Act, railway companies were not subject to the provisions of provincial drainage laws: *Miller v. Grand Trunk Railway Co.* (1880), 45 U.C.Q.B. 222; *McCrimmon v. Township of Yarmouth* (1900), 27 O.A.R. 636, 2 C. & S. 522; *Canadian Pacific Railway Company v. The Parish of Notre Dame de Bonsecours, supra.* Although s. 270 of The Railway Act makes railway companies subject to those laws, that section is not applicable to telephone companies, which therefore continue not to be subject to them. In any event, the respondent would be exempt under s. 12 of The Assessment Act, R.S.O. 1937, c. 272.

Nothing in s. 373 of the Dominion Railway Act, providing for the consent of a municipality or of the Railway and Transport Board, affects the rights of a telephone company to operate, maintain, renew or reconstruct underground or overhead systems or lines theretofore constructed; subs. 7 of s. 373 expressly so provides. There has never been any order by the Board, under subs. 6, for any change in these lines, or any application for such an order.

J. R. Cartwright, K.C., in reply: The respondent should have tested the validity of this legislation earlier, rather than raise it now as a means of escaping taxation: *Canadian Oil Fields Co. v. Village of Oil Springs* (1907), 13 O.L.R. 405. Under s. 32 of The Municipal Drainage Act, it could have been tested in two ways.

It should not be held that s. 8(20) authorizes an assessment only in addition to other assessments of the property of the utility, or that the intention of the Act is to divide the cost of drainage works only among persons benefited by such works. The more literal construction of a statute should not prevail if it is opposed to the intention of the Legislature, as apparent in the statute: *Caledonian Railway Company v. North British Railway Company* (1881), 6 App. Cas. 114. The fact that s. 8(20) provides for this assessment "in addition to" other assessments does not necessarily mean that there can be no assessment for drainage unless the person assessed for that is also assessed in some other way by the municipality: *Rex v. Davidson*, 11 Alta. L.R. 9, 35 D.L.R. 82 at 87, 28 C.C.C. 44, [1917] 2 W.W.R. 160.

We refer also to *Davis & Turpin v. The City of Sudbury*, [1943] O.R. 59, [1943] 1 D.L.R. 374; *In re Township of Rochester and Township of Mersea* (1901), 2 O.L.R. 435, 2 C. & S. at 74; Proctor, *op. cit.*, p. 40.

Cur. adv. vult.

14th November, 1945. HENDERSON J.A. agrees with LAIDLAW J.A.

LAIDLAW J.A.:— This is an appeal by the Corporation of the Township of Harwich from a judgment dated 12th January 1945, of His Honour J. J. Coughlin, Judge of the County Court of the County of Essex, sitting at the request of the Drainage Referee under the provisions of s. 98(2) of The Municipal Drainage Act, R.S.O. 1937, c. 278. By the judgment a by-law, number 3128, passed by the appellant on the 14th day of June 1943, amending by-law number 3100, passed by the appellant on the 15th day of April 1942, for the repair and improvement of the Walker drain in the appellant township, and being a by-law to raise an additional sum of \$1,275 for the alleged increase in cost of the repair and improvement of said Walker drain, by reason of the construction and operation of the respondent's telephone lines along said Walker drain on King's Highway No. 98 in the appellant township, was quashed. The learned judge held that the act of the appellant township was "an indirect interference with the physical structure of an authorized Dominion work", and "beyond any power which the Legislature could delegate to the Township of Harwich."

Walker drain is situate, for 7,560 feet of its length, on a provincial highway in the township of Harwich, known as King's Highway No. 98, formerly under the jurisdiction of the County of Kent, and then known as "the Gravel Road". The drain runs parallel to the travelled portion of the roadway, and about 16 to 20 feet northerly therefrom. The telephone poles, cables and incidental equipment constituting the plant of the respondent are located immediately north of the drain, and parallel to it for that part of its length in question. The cables extending between the telephone poles are at a height varying from 14 to 17½ feet above the ground at midspan, for a distance of about a mile at the easterly end, and are from 7 to 10½ feet above the ground at midspan for the remainder in length of the line at the westerly end of the section.

Upon notice from an owner of lands who contributed towards the construction of the drain, that it was out of repair, and a request by him that it be repaired and improved, the council of the appellant corporation procured an examination of the drain and of the lands and roads liable to assessment under The Municipal Drainage Act, to be made by George A. McCubbin, O.L.S., M.E.I.C. Plans, profile and specifications were prepared by Mr. McCubbin, and a report, dated 25th August 1941, was made by him. The report contains, *inter alia*, an estimate of the cost of work and incidental expenses "exclusive of railway culverts . . . and of the increase of cost of work caused by the construction and operation of a public utility" at \$1,035. The estimated cost was assessed by the engineer "against the lands and roads in the Township of Harwich and in the Town of Blenheim", as shown in the schedule annexed to his report. The report contains also the following provision "Where the drain is along the county road known as the Gravel Road the cables of the Bell Telephone Company are too low to permit the operation of ordinary excavating equipment. It will be necessary to raise or move such cables during the work of excavation, and the cost of such raising or moving being an increase of cost of the work caused by the construction and operation of a public utility, I assess against the Bell Telephone Company."

The respondent received a copy of the engineer's report from the clerk of the Township corporation on or about 10th December 1941. It was unwilling to bear the whole expense of altering its plant, and endeavoured to effect a compromise with the appel-

lant. The council of the appellant decided, however, that it was "not responsible for any costs the Bell Telephone Company may be put to on account of having to make rearrangements to their plant necessary in connection with proposed repair work to be done on the Walker drain", and notified the respondent accordingly under date 10th February 1942.

The council of the Township finally passed by-law no. 3100 on the 13th day of April 1942, wherein it is set forth "That the Report, plans, profile, Specification and Estimates of Geo. A. McCubbin C.E. of date of August 25 1941 are hereby adopted and the work as therein indicated and set forth shall be made and constructed in accordance therewith." No express provision is made in the by-law or in the schedule thereto charging the respondent for any of the cost of the drainage work.

A copy of by-law no. 3100 was sent by the clerk of the appellant corporation to the respondent on 8th May 1942. It may be observed that the respondent was not served with a copy of the by-law before the final passing thereof, but neither the consequence in law of such omission, nor the question of the validity of by-law no. 3100 was a matter in issue before the learned County Court Judge.

After the final passing of by-law no. 3100 the work of repair and improvement was commenced and completed to the part of the drain now in question. The respondent continued to refuse to raise or move its cables at its own expense. The appellant thereupon procured a further report from Mr. George McCubbin, dated 10th August 1942. Mr. McCubbin reported, in part, as follows:—"I estimate the increase of cost of the work due to the construction and operation of the Bell Telephone Company's lines at Twelve Hundred and Seventy-five Dollars (\$1,275.00), and in accordance with Sub-section 20 of Section 8 of the Municipal Drainage Act, I assess this amount against the Bell Telephone Company."

On 29th August 1942, the council of the appellant provisionally passed by-law no. 3128, purporting to adopt the report of Mr. McCubbin dated 10th August 1942. It provides, *inter alia*: "That for paying the said sum of \$1,275.00 and for covering interest thereon for five years at the rate of 4 per centum per annum the following total special rate over and above all other rates shall be assessed, levied and collected (in the same manner and at the same time as taxes are levied and collected) upon and

from the property of the Bell Telephone Company of Canada . . . And that said By-law Number 3100 be amended accordingly."

The respondent appealed to the Court of Revision from the assessment made against it in the report of the engineer dated 10th August 1942. The appeal was dismissed, and the respondent thereupon appealed to the County Judge of the County of Kent. That appeal was also dismissed, and the assessment was confirmed. The by-law was finally passed by the council of the appellant on 14th June 1943.

The respondent gave notice, dated 17th June 1943, of an application to the Drainage Referee for an order quashing by-law no. 3128, and declaring it to be null and void. Upon hearing before His Honour Judge J. J. Coughlin, sitting at the request of the Referee, a ruling was made that the validity of by-law no. 3100 was not in question in the proceedings, and by the judgment now in appeal by-law no. 3128 only is quashed.

Counsel for the appellant relies in particular on s. 8(20) of The Municipal Drainage Act, and argues that the enactment is *intra vires* of the Legislature of the Province of Ontario, and that the assessment made thereunder is valid and binding on the respondent. Counsel on behalf of the Attorney-General for Ontario supports the argument that the legislation is within the legislative power of the Provincial Legislature.

On behalf of the respondent counsel urged that "the attempted assessment following the refusal of the Respondent to alter the physical structure of its lines cannot be supported by Provincial legislation which is *ultra vires*, if it purports to authorize the said assessment"; that the respondent is exempt from the assessment in question by virtue of the provisions of The Assessment Act, R.S.O. 1937, c. 272, s. 12; that in any event s. 8(20) of The Municipal Drainage Act is not applicable to the facts and circumstances of this case, because: (a) the amount of assessment was not "in addition to all other sums lawfully assessed against the property of any public utility" under the provisions of the Act; (b) the respondent is not the owner of any lands or roads in the township of Harwich; (c) there was admittedly no benefit to the respondent from the drainage works; (d) ss. 1 to 70 of the Act, including s. 8, relate only to the original construction of a drain and not to its subsequent repair or improvement.

During the hearing of the appeal the unanimous opinion of the members of the Court was expressed that it was unnecessary, in this case, to determine the question of the validity of s. 8(20) of The Municipal Drainage Act. Likewise, I think it is unnecessary to decide other questions raised in the appeal, for example, whether the respondent is exempt in all cases from assessment under The Municipal Drainage Act by reason of the provisions of The Assessment Act, *supra*; or whether ss. 1 to 70 of the statute relate only to the work of original construction of a drain. The principal question requiring the decision of the Court is whether the increased cost of the drainage work caused by the refusal of the respondent to raise or move its cables at its own expense can be assessed against the respondent under s. 8(20) of The Municipal Drainage Act, when, admittedly, the respondent is not the owner of any lands in the township and derives no benefit from the drain or the proposed work.

Subss. 18, 19 and 20 of s. 8 of The Municipal Drainage Act were first enacted in 1920, by 10-11 Geo. V, c. 67, s. 5, as subss. 12, 13 and 14 of s. 9, and it will be necessary to consider whether or not the addition of those provisions to the statute made any change in the fundamental principles underlying the provisions of the prior legislation. I, therefore, examine the authorities with a view to finding the principles properly applicable before those amendments were made.

I reach the following conclusions:

(1) The subject of assessment under the Act is "lands or roads". By s. 2(1) the council of a municipality is empowered to procure an engineer or Ontario land surveyor to make an examination of the area to be drained and "to make an assessment of the lands and roads within said area to be benefited and of any other lands and roads liable to be assessed as hereinafter provided". Section 6 refers to the assessment "upon any lands or roads for any drainage work". Section 12(1) requires that sums charged for benefit, outlet liability and injuring liability shall be inserted in the assessment schedule opposite "the lands and roads liable therefor". Section 12(2) refers to fixing "the sum to be assessed upon any lands or roads". Section 21(3) empowers the council of the municipality to pass a by-law for assessing and levying a special rate "upon the lands and roads"; and by s. 21(5) "For determining what lands and roads will be benefited by or otherwise rendered liable for assess-

ment for the drainage work". Sections 60 and 63 authorize the engineer to assess a proportion of the cost of the work against lands or roads. I do not refer to many other sections to support the view that the assessment authorized under the provisions of The Municipal Drainage Act is upon lands or roads only, and is not a personal tax or charge, apart from and without reference to ownership of lands or roads.

(2) The assessment of lands or roads can only be properly made in two classes of cases: (a) lands or roads within an area to be benefited, and (b) any other lands or roads liable to be assessed as expressly provided in the Act: see ss. 2(1), 5, 21(3), (5).

It has been held under the provisions of prior legislation that lands or roads which derive no benefit from drainage works cannot be held liable for any part of the cost thereof: *The Township of Chatham and North Gore v. The Township of Dover East and West* (1886), 12 S.C.R. 321 at 351, where Gwynne J. states: "If the work should be for the benefit of Chatham alone, and should confer no benefit upon lands in Dover, no lands in Dover should be assessed; only such as should be benefited should be assessed, and each lot, separately, only with the amount of the benefit it should receive." At p. 364, he concludes upon the evidence in that case that it failed to establish that the proposed work would confer any benefit upon the lands and roads assessed. For that reason the award was set aside.

In *Broughton v. The Township of Grey and The Township of Elma* (1897), 27 S.C.R. 495 at 503, 1 C. & S. 169, Gwynne J. says: "The whole scheme of the legislation upon the subject is that they who derive benefit from such a work, and they only, shall bear the burden of its construction and maintenance. *Qui sentit commodum sentire debet et onus* is the principle upon which all legislation on the subject is expressly founded."

The words in s. 2(1) of the statute, "any other lands and roads liable to be assessed as hereinafter provided", do not alter the fundamental principle underlying the provisions of the statute. In *The Sutherland-Innes Company v. The Township of Romney* (1900), 30 S.C.R. 495 at 515, 2 C. & S. 96, Gwynne J. discussed the construction to be put upon these words. He says: "I find an insuperable difficulty in construing them as having the intent and effect . . . of abrogating the fundamental, essential, principle upon which rest these clauses in the Municipal

Institutions Acts for constructing local works for the improvement of particular lands at the cost of the owners of the lands which are benefited thereby, expressed in the maxim *qui sentit commodum sentire debet et onus*, and substituting therefor a provision which subjects persons who derive no benefit whatever from the work to contribute to the payment of its cost." At p. 519 he continues: "A careful consideration of the Act therefore condemns, in my judgment, as wholly inadmissible, a construction which should hold that lands not benefited by a drainage work constructed under the provisions of the Act are nevertheless made liable to assessment for 'injuring liability' or 'outlet liability', notwithstanding the words in the third section purporting to authorize the engineer 'to make an assessment of the lands and roads within said area to be *benefited* and of *any other* lands and roads liable to assessment as hereinafter provided'".

By s. 2(1) of the Act the engineer is empowered to make an assessment against lands or roads, first, for "benefit", second for "outlet liability", and third for "relief from injuring liability". By s. 12(1) he is required in his report to "assess for benefit, outlet liability and injuring liability". Section 60 authorizes the engineer to assess a proportion of the cost of work against lands or roads "which will, in the opinion of the engineer or surveyor, be benefited by such work or furnished with an improved outlet or relieved from liability for causing water to flow upon and injure lands or roads". Likewise, by s. 63, the engineer may assess and charge all lands and roads "to be affected by benefit, outlet or relief". See also s. 64 in like language. There was no provision in the legislation prior to 1920 enabling an engineer to make an assessment against lands or roads except on the basis and within the classes of cases mentioned. There was no provision or authority under which an engineer could make an assessment for any part of the cost of drainage work by way of a personal charge or tax apart from the ownership of lands or roads. There was no authorized method of imposing the tax sought to be levied against the property of the respondent under the circumstances of the present case.

It remains to be considered whether or not the addition of s. 8(18), (19) and (20), as made by amendment to The Municipal Drainage Act in 1920, extends the authority of the engineer to make the assessment in question. The engineer purported to make the assessment "in accordance with Sub-section 20 of

Section 8". But the plain meaning and construction to be put upon the language used in that subsection is that the assessment thereby authorized is "In addition to all other sums lawfully assessed against the property of any public utility" under the provisions of the Act. It is an essential element to the application of the subsection that there be property of a public utility against which a lawful assessment under the statute can be made. When such an assessment can be made the engineer is authorized to make an assessment "in addition" thereto. If there be no property of the public utility subject to lawful assessment under the statute, then no assessment can be made under this subsection of the Act. In my opinion there is nothing in s. 8(18), (19) or (20) which changes the fundamental principle underlying the provisions of the legislation prior thereto. In particular, it does not create authority in the engineer to make an assessment for any part of the cost of drainage work against a person who is not the owner of any lands or roads, and who does not derive any benefit from the work. A contrary view would, I think, bring about inequitable and unjust imposition of liability for the cost of works of local improvement.

In support of the opinion I have expressed it may be observed that the "Procedure for Trial of Complaints" under ss. 35 *et seq.* provides an appeal by "Any owner of land, or, where roads in a municipality are assessed, any ratepayer, complaining of overcharge in the assessment of his own land, or of any roads of the municipality". There is no procedure available by way of complaint or appeal by a public utility that is not an owner of land, as in this case. The respondent does not fall within the provisions of s. 35, under the particular circumstances, and had no right thereunder to appeal to the Court of Revision or to the County Court Judge. It could not have been intended by the amendment to the statute to authorize an assessment against a public utility owning no land, and, at the same time, to make no provision by which a complaint could be made in respect thereof.

The appellant in its notice of appeal sets out "That the learned Acting Referee erred in allowing the Respondent to raise and argue the question of their assessment on the motion before him to quash the said By-law, after the Respondent had appealed the assessment against it, to the Court of Revision and to the County Court Judge under the provisions of The Municipal

Drainage Act.” On the argument before this Court it was contended on behalf of the appellant that the respondent was estopped from attacking the validity of by-law no. 3128 by its conduct in appealing its assessment to the Court of Revision and to the County Court Judge. It was not known to counsel, and does not appear in the proceedings, whether the respondent appealed to the Court of Revision or to the County Court Judge on the ground that the assessment was unauthorized and invalid.

It is my view that such a complaint cannot be made in proceedings taken under s. 35 of the Act. That section specifies the causes of complaint falling within the section, namely, “overcharge in the assessment . . . or . . . the undercharge . . . or that lands or roads which should have been assessed, have been omitted from the assessment”. Thus, in my opinion, the respondent not only had no right to complain to the Court of Revision under the circumstances, but no objection that the assessment was unauthorized and invalid could be taken by way of appeal to that Court. The only available procedure was by application to the Drainage Referee under s. 98(1) of the Act.

My conclusion is that s. 8(20) did not empower the engineer, by the report made by him dated 25th August 1941, or the subsequent report dated 10th August 1942, to make an assessment, under the particular circumstances of this case, against the property of the respondent. By-law no. 3128, finally passed by the council of the Township of Harwich on the 14th June 1943, was, accordingly, invalid and properly quashed by the judgment of the learned County Court Judge.

The appeal should, therefore, be dismissed with costs.

MCRUER J.A.:—I am of the opinion that this appeal fails on the ground that whatever rights the appellant would have to assess the respondent under the provisions of s. 8, subss. 18 to 20, of The Municipal Drainage Act, R.S.O. 1937, c. 278, for the construction of a new work, the provisions of the statute do not extend to repairs made to a drain previously constructed and for which an assessment has been made in accordance with the statute, but for the cost of which the appellant has not been assessed.

The scheme of the Act is to make certain specific provisions for the construction of new works, and other provisions for the repair of works after they have been constructed. Sections

1 to 70 deal with construction, except where by direct language or clear implication they apply to repairs, while ss. 71 to 83 deal with repairs to drains that have been constructed and for which an assessment has been made. With the exception of s. 8, subss. 18 to 20, the Act provides for the assessment of lands and roads. In my view s. 8, subss. 18 to 20, make provision for the assessment of a public utility where a drainage work has been or shall thereafter be constructed along, under or across "transmission lines, power lines, wires, conduits or other permanent property of the public utility", even though there may be no lands or roads belonging to the public utility that are assessable. If, however, it is sought to assess a public utility under the provisions of s. 8(20), as distinct from its lands and roads, for the repair of a drain that has already been constructed and for which the public utility has not been assessed previously, the right must be found in clear language in the statute. Section 8(18) refers to construction only, and nowhere is there to be found any similar provision for the exercise of the special power of assessment of a public utility in respect of the repair of a drain for which the public utility has not been assessed for the original cost of the work. In view of the conclusion that I have come to, I refrain from expressing any opinion on other matters raised in the appeal.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Clunis & Kee, Chatham.

Solicitors for the respondent: Wilson, Pike, Stewart & Lewies, Chatham.

[COURT OF APPEAL.]

Rex v. Brown.

Criminal Law—Special Pleas—Autrefois convict—Conviction for Subsequent Offence, followed by Prosecution for Conspiracy to Commit that Offence—The Criminal Code, R.S.C. 1927, c. 36, ss. 573, 907.

Conspiracy—Nature of Offence—Distinction between Conspiracy to Commit Indictable Offence and Substantive Offence itself—Autrefois convict.

A conviction for an indictable offence will not support a plea of *autrefois convict* to an indictment, later proceeded with, for conspiracy to commit that offence. The test is not whether the two prosecutions arise out of the same facts, but whether the offences in question are the same or substantially the same. *Rex v. Barron*, [1914] 2 K.B. 570; *Rex v. Kendrick and Smith* (1931), 144 L.T. 748. The substantive offence involves no element of conspiring with others to commit it, and it is quite possible that an accused may be guilty of conspiring to commit an offence without being concerned in the actual commission of it. *Rex v. Kupferberg* (1918), 13 Cr. App. R. 166.

Criminal Law—Appeals—Powers of Court—No Power to Quash Indictment or Direct that No Further Proceedings be Taken.

Semble, the Court of Appeal has no power to quash an indictment pending in a lower court on the ground that it would be unfair and unjust for the Crown to proceed with it, or to direct that no further proceedings be taken. *Reg. v. Stockley* (1842), 3 Q.B. 238; *Rex v. Laws* (1908), 1 Cr. App. R. 6, considered; other English decisions referred to. In the circumstances of this case, however, the Court expressed a strong opinion that it would be unjust if further proceedings were taken on the indictment, and recommended that they should not be taken.

AN APPEAL by the Attorney-General for Ontario from the judgment of McFarland J., [1945] O.W.N. 713, discharging an accused upon a plea of *autrefois convict*.

5th November 1945. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and ROACH JJ.A.

J. J. Robinette, K.C., for the Attorney-General, appellant: The offence of conspiracy is entirely different from the substantive offences of which the accused was convicted. It is true that much of the evidence would be the same, but that is not the test: *Rex v. Barron*, [1914] 2 K.B. 570 at 575-6; *Rex v. Kendrick and Smith* (1931), 144 L.T. 748; *Rex v. Kupferberg* (1918), 13 Cr. App. R. 166; *Rex v. Horning* (1922), 51 O.L.R. 504, 38 C.C.C. 239, 69 D.L.R. 530; *Rex v. Weiss and Williams* (1913), 6 Alta. L.R. 262, 5 W.W.R. 48, 460, 25 W.L.R. 351, 22 C.C.C. 42, 13 D.L.R. 633. The other two cases mentioned by the trial judge, *Rex v. Hayes and Pallante*, [1942] O.R. 52, 77 C.C.C. 195, [1942] 2 D.L.R. 85; and *Rex v. Hill and McDonald*, [1944] O.W.N. 581, 82 C.C.C. 213, [1944] 4 D.L.R. 377, deal with an entirely different question, and do not support his decision.

It is not open to this Court to consider whether or not the Crown is acting fairly.

Hon. S. A. Hayden, K.C., for the accused, respondent: This Court is not limited to a decision as to whether the trial judge was right as to the plea of *autrefois convict*. This is an appeal from an acquittal, and the Court must look at all the circumstances and determine whether there has been any substantial wrong or miscarriage of justice.

To proceed with the conspiracy charges, in the circumstances, would be unfair. The accused pleaded guilty before the magistrate on the understanding that the conspiracy charges would not be proceeded with. He now comes out of gaol, having served his sentences for the substantive offences, and finds himself faced with additional charges. He is entitled, in fairness, to have all pending charges disposed of at one time, so that the total term of his imprisonment can be determined, and he can come out of prison with a "clean sheet": *Rex v. Taylor* (1909), 2 Cr. App. R. 158; *Rex v. Markham* (1909), 2 Cr. App. R. 160; *Rex v. Whiteley* (1923), 17 Cr. App. R. 159; *Rex v. Rose* (1923), 17 Cr. App. R. 135; *Rex v. Hart* (1932), 23 Cr. App. R. 202.

If the accused had not understood that the conspiracy charges would be withdrawn, he could have chosen a preliminary hearing on the substantive charges, thus getting all charges into the same court for disposition.

There is inherent jurisdiction in this Court to consider these circumstances, quite apart from the question whether the trial judge was correct on the special plea. The provisions of s. 1014 (2) of The Criminal Code, R.S.C. 1927, c. 36, apply to this appeal by virtue of s. 1013(5), as re-enacted by 1930, c. 11, s. 28.

The plea of *autrefois convict* is based upon the common law rule that a man shall not be placed in peril twice for the same offence. The English decisions are applicable only to the extent that the Code has not added to or subtracted from the common law. The language of s. 907 is that the "matter" must be the same—this involves looking beyond the language of the charge. The final clause of s. 907 might create a difficulty for my position, were it not for s. 909, which refers to a prosecution for "substantially" the same offence. In *Rex v. Welsh*, 82 C.C.C. 219 at 227, [1944] 4 D.L.R. 553, illustrations are given of circumstances in which the special plea would not apply.

The test under our law is not whether the two offences are in essence the same. The word "substantially" in s. 909 must mean that where the offences arise out of the same circumstances, and are so related that the quality of the offences may be the same, the special plea is applicable. The "matter" must be considered, as well as the legal elements of the offence. Taking these considerations into account, it can be said that the offences here are "substantially" the same. There is some support for this view in *Rex v. Barron, supra*.

The substantive charge here is the broader, and more all-embracing, and it was proceeded with first. Very often a conspiracy charge is established by proving the actual offence, and then asking the jury to infer an antecedent agreement to commit it.

J. J. Robinette, K.C., in reply: Sections 907 and 909 merely state the doctrine discussed in the cases. To emphasize the word "substantially" in s. 909 is to overlook the rest of the section. To allege a conspiracy to commit an offence is not merely to add a statement of intention, or circumstances of aggravation.

Any unfairness in the proceedings is the responsibility of the Crown officers. This Court has no power to quash an indictment or direct that it be not proceeded with.

Cur. adv. vult.

30th November 1945. The judgment of the Court was delivered by

GILLANDERS J.A.:—In September 1943 the respondent, with three other persons, was indicted, and a true bill was found against him, on three counts of conspiracy, one charging conspiracy to cause The Canada Comforter Company to deliver to His Majesty defective naval, military and air force stores, to wit, mattresses, contrary to ss. 436 and 573 of The Criminal Code, R.S.C. 1927, c. 36; one charging conspiracy to defraud His Majesty of certain sums of money in connection with the sale and delivery by The Canada Comforter Company of mattresses, contrary to s. 444 of The Criminal Code; and one charging conspiracy to defraud by false pretences to procure certain sums of money to be paid by His Majesty to Canada Comforter Company, contrary to ss. 405(1) and 573 of the Criminal Code.

The trial of these conspiracy charges was adjourned from time to time by reason of circumstances, and no criticism of anyone for the delay is suggested.

Finally, in September 1944, three informations were sworn charging the respondent with substantive offences in that the respondent caused The Canada Comforter Company to supply defective mattresses, in one charge to the navy, in one to the army and in one to the air force, contrary to s. 436 of The Criminal Code, as amended by 1939, c. 30, s. 8.

On 22nd September 1944 these substantive charges came on for trial before a police magistrate, when the respondent elected summary trial before the magistrate, entered a plea of guilty to each of the three charges and, following his conviction, was sentenced on each of the three charges to serve a year in gaol, and to pay a fine of \$5,000, and in default of payment of the fine to be committed to gaol for an additional year.

It is said that the fines have been paid but that appeals from these sentences, both by the respondent and by the Crown, have been launched and are now pending.

Subsequently the Crown proceeded with the conspiracy charges and these came on at the assizes and after arraignment the respondent moved before Mr. Justice McFarland, the presiding judge, for his discharge and pleaded *autrefois convict*. This motion was allowed and the Crown now appeals to this Court from the respondent's acquittal on the conspiracy charges.

The appeal raises two questions: (1) whether or not the special plea of *autrefois convict* provides a defence to the conspiracy charges; and (2) in any event, whether under circumstances to be more fully discussed later, the respondent was properly acquitted.

As to the plea of *autrefois convict*, I think in the circumstances it provides no answer to the conspiracy charges. In *Rex v. Barron*, [1914] 2 K.B. 570, Lord Reading fully discusses the principle on which a special plea of *autrefois acquit* depends, and the circumstances which must be found if the plea is to prevail, and this, of course, applies as fully to the plea of *autrefois convict*. He says in part, at p. 574:

" . . . the law does not permit a man to be twice in peril of being convicted of the same offence. If, therefore, he has been acquitted, i.e., found to be not guilty of the offence, by a Court competent to try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment." And again at page 576:

"The test is not, in our opinion, whether the facts relied upon are the same in the two trials. The question is whether the appellant has been acquitted of an offence which is the same offence".

So in *Rex v. Kendrick and Smith* (1931), 144 L.T. 748, where *autrefois convict* was pleaded, Swift J. followed the test laid down in *Rex v. Barron, supra*, that whether or not such a plea had been established depended not on whether the facts relied upon by the Crown were the same in the two trials, but upon whether the accused had been convicted of an offence which was the same or practically the same as that with which he was charged on the second trial.

It seems clear that, applying this test here, the plea does not provide an answer to the conspiracy charges. The respondent has not been convicted of an offence which is the same or practically the same as conspiracy. The substantive offences of which he has been convicted do not necessarily involve the ingredient that he conspired with others to commit them. On the other hand, he might well be guilty of conspiracy without being involved in the substantive offences.

In *Rex v. Kupferberg* (1918), 13 Cr. App. R. 166, Lawrence J. says, at p. 168:

"A charge of conspiracy is not the same as one of aiding and abetting. It is true that in many cases aiding and abetting is done by the mutual consent of the criminals, but it is not essential that it should be. For a plea of *autrefois acquit* to be maintainable, the offence of which the accused has been acquitted and that with which he is charged must be the same in the sense that each must have the same essential ingredients. The facts which constitute the one must be sufficient to justify a conviction for the other. To prove conspiracy against the appellant, it is necessary that an agreement, express or implied, should be proved to the satisfaction of the jury, but it is quite unnecessary to prove such agreement where the charge is one of aiding and abetting."

It is, however, urged that whether or not the special plea provides an answer, the respondent was under the circumstances properly acquitted. Certain facts, which are not in dispute, were fully and fairly stated by counsel to the trial judge on the motion for the respondent's discharge. Counsel for the Crown, originally acting on instructions from the Department of Justice of the Dominion of Canada, in order to expedite matters

advised the Department of Justice that the laying of substantive charges in lieu of the conspiracy charges should be considered, and subsequently, in 1944, the Department of Justice, acting on this advice, instructed the laying of the three substantive charges. Before the hearing of these charges, counsel for the Crown advised counsel for the respondent that he had received instructions to proceed with the substantive charges and that the conspiracy charges would not be proceeded with, but that the conspiracy charges would not be withdrawn until after the substantive charges had been disposed of. Subsequently counsel for the Crown, acting on instructions from the Attorney-General of the Province, who was then directing the prosecution, proceeded with the pending conspiracy charges.

While the conspiracy charges had not been withdrawn or dismissed when the respondent pleaded to the substantive charges. it is clear that when he did so it was on the understanding, based on the assurance of counsel for the Crown, that the conspiracy charges would not thereafter be pressed. In my view, under these circumstances, it would be unfair and unjust to the respondent to proceed now with the conspiracy charges. It may be that without the understanding that it was not the intention of the Crown to proceed further on the conspiracy charges the respondent, instead of electing summary trial before the magistrate on the substantive charges, might have elected trial in a higher court with the object of getting all the charges before the same court, or have taken some course other than under the circumstances he did.

In *Rex v. Laws* (1908), 1 Cr. App. R. 6, the Court quashed a conviction for assault against the appellant. Counsel for the appellant then asked the Court to order that another indictment standing against the appellant in respect of the same assault, be removed from the file of the Court below, but the Lord Chief Justice said that the Court had no power to do so.

In *Rex v. Grant et al.* (1944), 30 Cr. App. R. 99, Birkett J., under circumstances which are not relevant here, was influenced in quashing the indictment there in question by the consideration that there should be no suggestion of unfairness or prejudice in the administration of the criminal law. In *Rex v. Rose* (1923), 17 Cr. App. R. 135, it appeared in the course of an appeal from sentence that at the time the appellant pleaded guilty and was sentenced a second indictment to which he had pleaded not guilty was allowed to remain on file and no proceedings had been taken

thereon in the meantime. The Court, under the circumstances of that case, directed that the second indictment be never proceeded with. In *Rex v. Hart* (1932), 23 Cr. App. R. 202, where a second indictment was left on file at the time of the appellant's conviction, and sentence and prompt proceedings had not been taken thereon, the Court said:—"In our opinion, therefore, there ought to be no proceedings on the indictment" which had been left on file.

Section 962 of the Code provides a means by which the Attorney-General may stay the proceedings on an indictment. This is substantially the well-recognized common law procedure of *nolle prosequi*, but no similar power is conferred on the Court by the Code nor, so far as I know, is there clear authority at common law for the Court exercising such a power.

The cases may be a little difficult to reconcile, but in the absence of clear authority I am not satisfied that this Court, under all the circumstances disclosed, has, at this stage, power either to quash the pending indictment or to order that no further proceedings be taken thereon. The Court should be satisfied that there is such authority before purporting so to act. In *Reg. v. Stockley* (1842), 3 Q.B. 238, 114 E.R. 498, two indictments for the same alleged offence were found at the same session and the defendant moved that one or both be quashed on an affidavit that both were for the same offence. Lord Denman C.J. said: "We ought to see a distinct authority, enabling us to do what is required; and even then we should be very careful in exercising such a discretion."

While not satisfied that this Court has the power to quash, or to order that no further proceedings be taken, I do not hesitate to express the opinion, strongly held, that under the circumstances disclosed it would be unjust and unfair to continue these proceedings.

In the result, for reasons stated, the order in appeal acquitting the respondent must be set aside, but I would recommend that there should be no further proceedings against the respondent on the conspiracy indictment.

Appeal allowed.

Solicitor for the Attorney-General, appellant: John J. Robinette, Toronto.

Solicitors for the accused, respondent: McCarthy & McCarthy, Toronto.

[COURT OF APPEAL.]

Burns v. Hodgson.

Landlord and Tenant—Special Wartime Controls—Suspension of Notice to Quit—Effect of Acceptance of Rent after Expiry of Notice—Order 537, The Wartime Prices and Trade Board, ss. 3, 4.

Although the acceptance of rent after the expiry of the time specified in a notice to quit may be evidence of an agreement for a new tenancy on the old terms, this cannot be the case where the landlord, by virtue of a provision having the force of a statute, is unable to get possession.

A landlord gave a notice to quit, in accordance with the wartime regulations then in force, expiring on 19th July. On 25th July, Order 537 of the Wartime Prices and Trade Board came into effect, providing, by s. 3, that every notice to quit theretofore given should be suspended, and that all proceedings then pending for possession should be stayed. An order was obtained removing the stay as of 15th September. This order was made under s. 4 of Order 537, which provided that where such an order was made "the term of the tenant's lease shall be deemed to have been extended to and terminated on that date."

Held, the acceptance of rent by the landlord after 25th July was not, in these circumstances, evidence of an agreement for a new tenancy. The old tenancy had been effectively terminated by the notice on 19th July, but a new statutory tenancy had been created, and the acceptance of rent during this tenancy did not affect the landlord's right to possession after its termination by the removal of the stay. *Hartell v. Blackler*, [1920] 2 K.B. 161, not followed; *Davies v. Bristow*, [1920] 3 K.B. 428; *Shuter v. Hersh*, [1922] 1 K.B. 438; *Felce v. Hill* (1923), 39 T.L.R. 673; *Thompsons (Funeral Furnishers) Ltd. v. Phillips*, [1945] 2 All E.R. 49; *Morrison v. Jacobs*, [1945] 2 All E.R. 430, applied.

Landlord and Tenant—Summary Proceedings against Overholding Tenant—Jurisdiction of Judge—Irregularities in Notice to Tenant—Effect of Tenant's Appearance and Participation and of Successful Motion by Tenant for Reconsideration of Order—The Landlord and Tenant Act, R.S.O. 1937, c. 219, ss. 75, 77, 78.

The provisions of s. 75 of The Landlord and Tenant Act are for the purpose of giving proper notice to a tenant of an application by his landlord for possession, and the jurisdiction of a judge to proceed, if the tenant does not appear, under s. 77(1), is dependent upon proof of a notice accompanied by all proper formalities—*e.g.*, service of a copy of the landlord's affidavit. But the judge's jurisdiction, under s. 77(2), to inquire summarily into the matter is dependent upon the appearance of the parties before him, and the tenant's appearance and participation in the proceedings will give this jurisdiction to the judge, despite any irregularities in the previous proceedings. *Rex v. Isbell* (1928), 63 O.L.R. 384; *Reg. v. Hughes* (1879), 4 Q.B.D. 614, applied. In any event, if the tenant, after an order for possession has been made against him, applies for a rehearing, after which he obtains an order rescinding the previous order and dismissing the landlord's application, he cannot then allege, in support of this second order, that the judge lacked jurisdiction. *In re Dewar and Dumas* (1904), 8 O.L.R. 141, applied.

AN APPEAL by a landlord from an order of Barton Co. Ct. J., of the County Court of the County of York, dismissing an application for a writ of possession.

12th November 1945. The appeal was heard by HENDERSON, ROACH and MCRUER JJ.A.

W. H. Powell, for the landlord, appellant: There was no implied tenancy from year to year after the expiry of the original term certain, because the parties, by their conduct, had set up a new basis, on which the tenant was permitted to remain in possession as a monthly tenant only.

The landlord's retention of the money order for \$60 was not a waiver of the notice to quit. *Hartell v. Blackler*, [1920] 2 K.B. 161, relied on by the trial judge, has been overruled by *Davies v. Bristow*; *Penrhos College, Limited v. Butler*, [1920] 3 K.B. 428; *Shuter v. Hersh*, [1922] 1 K.B. 438; *Felce v. Hill* (1923), 39 T.L.R. 673; *Thompsons (Funeral Furnishers) Ltd. v. Phillips*, [1945] 2 All E.R. 49; *Morrison v. Jacobs*, [1945] 2 All E.R. 430. See also Woodfall, *Landlord and Tenant*, 24th ed. 1939, p. 980. This case differs from those in which acceptance of rent after a forfeiture has been held to constitute a waiver of the forfeiture.

When the landlord received this rent, she had no way of knowing how long the tenant would be entitled to stay in possession under Order 537 of the Wartime Prices and Trade Board ([1945] 3 C.W.O.R. 170). The tenant was then, and until 15th September, a "statutory tenant", to use the term employed in the English cases, and as such was bound to pay rent. Surely the landlord's acceptance of rent, which the tenant was bound to pay, should not be considered a waiver of any of her rights.

F. H. Ganz, for the tenant, respondent: The tenant was not properly served with notice of the appointment, in that there was no copy of the landlord's affidavit, and no statement of the facts on which the landlord relied as entitling her to possession, as required by s. 75 of The Landlord and Tenant Act, R.S.O. 1937, c. 219. The judge below therefore had no jurisdiction to make an order for possession. [McRUER J.A.: That might have been a ground for appealing from his first order, but instead of that you applied for a rehearing, before the order had been taken out.] We could not give the judge a jurisdiction he did not possess. [McRUER J.A.: That may be true in some cases, but a mere irregularity can be waived.] There was more than a mere irregularity here; the defects in procedure go to the judge's jurisdiction.

The landlord's failure to return the \$60 was a waiver of the notice to quit. The English cases are inapplicable, because of the difference in the enactments. Order 537 does not create

a statutory tenancy, but merely stays proceedings on notices given before its coming into effect. The landlord's rights are not affected; he has a right to apply under s. 4 for exemption. [McRuer J.A.: Does not a right to stay in the premises create a tenancy of some kind?] If a statutory tenancy is created, then the effect of the notice to vacate is destroyed.

The English cases are discussed in an article by J. F. Clerk in 37 Law Quarterly Review (1921), p. 203. The author points out that *Hartell v. Blackler*, *supra*, was decided under the common law, whereas the others were under a statutory provision expressly allowing the landlord to collect rent. Where there is a question of waiver, there is no distinction between forfeiture and the termination of the lease by a notice to quit. We have no statutory provision corresponding to that considered in the later English cases. [McRuer J.A.: Must the landlord go without rent for several months, until the removal of the "freezing", or else create a new tenancy?] He can accept it if it is given as occupation rent. "Occupation rent" is not properly rent, but damages, not owing until judgment has been given. The landlord was therefore not entitled to hold this money, which was sent to her as rent, and call it "occupation rent".

Levy v. Kesry, [1945] N.Z.L.R. 209 at 215, follows the reasoning in *Hartell v. Blackler*, *supra*. The principle of *Croft v. Lumley* (1858), 6 H.L. Cas. 672, 10 E.R. 1459, is equally applicable where there has been a notice to quit: *Laidlaw v. Rehill*, [1943] 1 W.W.R. 796, [1943] 4 D.L.R. 429. The tenancy, after the expiry of the original term, was one from year to year, not from month to month. Even if the tenant did receive the landlord's letter, which is denied, it was not sufficient to alter the terms of the tenancy. [HENDERSON J.A.: The trial judge has found the facts against you on that issue.]

W. H. Powell, in reply: *In re Dewar and Dumas* (1904), 8 O.L.R. 141, shows that failure to serve other papers with the appointment is not fatal if the tenant appears. It is a mere irregularity which can be waived, and which was waived here; s. 78 of The Landlord and Tenant Act gives power to the judge to excuse irregularities, which he did here. No objection was taken on this ground on our first appearance before the judge, and the matter was then adjourned, at the tenant's request: *Manning v. Bireley* (1866), 2 C.L.J. 332; Holmsted & Langton, Ontario Judicature Act, 5th ed. 1940, pp. 808, 811. By re-apply-

ing to the judge and asking him to review his own order, the tenant must be taken to have submitted to the jurisdiction. This Court has the same power as the County Court Judge to relieve against irregularities.

I refer also to *Allen v. McAlpin*, [1944] 1 W.W.R. 110 at 111, citing *Doe ex d. Cheny v. Batten* (1775), 1 Cowp. 243, 98 E.R. 1066; *Engvall v. Ideal Flats Ltd.*, [1945] K.B. 205, [1945] 1 All E.R. 230.

Cur. adv. vult.

30th November 1945. The judgment of the Court was delivered by

MCRUER J.A.:—This is an appeal by the landlord from an order of His Honour Judge Barton dismissing an application of the landlord for an order that a writ issue for possession of 81 Brandon Avenue, in the city of Toronto, premises occupied by the tenant. It was agreed between counsel for the parties that the transcript of the proceedings before the learned County Judge was unsatisfactory and that a statement of facts filed should be used in lieu of the transcript of evidence.

Three main contentions are put forward on behalf of the tenant:

1. The learned County Judge did not have jurisdiction to entertain the application because the appointment for the hearing was taken out before the notice to quit had expired and the notice of the appointment served on the tenant was not accompanied by a statement of the principal facts alleged by the landlord as entitling her to possession, and the affidavit on which the appointment was obtained.

2. The tenant was a tenant from year to year and the notice to quit did not terminate the tenancy.

3. The landlord, by the acceptance of a money order for \$60 after the expiration of the notice to quit, renewed the tenancy.

I will deal with these contentions in the order in which I have set them out.

Section 75 of The Landlord and Tenant Act, R.S.O. 1937, c. 219, provides that where a tenant, after his lease or right of occupation has expired or been determined, wrongfully refuses or neglects to go out of possession, the landlord may apply upon

affidavit to the judge of a county or district court to make the inquiry provided for in the Act. The judge shall in writing appoint a time and place at which he will inquire and determine whether the tenancy has been determined and whether the tenant wrongfully refuses to go out of possession. Notice in writing of the appointment, stating briefly the principal facts alleged by the landlord, together with the affidavit on which the appointment was obtained, shall be served on the tenant three days before the appointment, except in certain circumstances not applicable to this case.

Section 77(1) provides that if the tenant fails to appear, the judge, if it appears to him that the tenant wrongfully holds against the right of the landlord, may make an order for a writ of possession. Subs. 2 provides: "If the tenant appears the judge shall, in a summary manner, hear the parties and their witnesses, and examine into the matter, and if it appears to the judge that the tenant wrongfully holds against the right of the landlord he may order the issue of the writ."

Section 78 provides that the judge shall have the same power to amend or excuse irregularities in the proceedings as he would have in an action.

The appointment for the hearing on 27th September 1945, is signed by His Honour Judge Factor. It purports to be dated 19th July 1945. By an affidavit filed on consent of counsel for both parties, it appears that this is a clerical error and the appointment was in fact taken out on the 19th September 1945. It recites, "upon reading the affidavit of Alice Burns filed". The affidavit of Alice Burns was sworn to on the 24th July 1945.

The matter came on for hearing on 27th September, but before what judge it does not appear, but it does appear that at the request of counsel for the tenant it was adjourned until 4th October, so that a reporter might be present. On 4th October all parties appeared before His Honour Judge Barton, when counsel for the tenant took the objection that the proceedings were defective, and that until the tenant had been served with all the required documents the Court had no jurisdiction to hear the matter. His Honour Judge Barton overruled the objections, holding that all parties were before him and that he had jurisdiction to enter into the inquiry, as provided by s. 77(2) of The Landlord and Tenant Act. After hearing

evidence, the County Judge made an order that a writ of possession of the premises issue.

On 12th October the solicitor for the tenant served on the solicitor for the landlord a notice that his Honour Judge Barton had appointed Monday, the 15th October 1945, "to review the order for possession made by him on the 4th day of October, 1945 . . . on the ground that the tenancy . . . was not a monthly tenancy . . . but was a tenancy from year to year", and stating that in support of the application the documents referred to in the previous proceedings would be read. On the return of this appointment the County Judge made an order dismissing the landlord's application on the merits.

Section 77(1) confers on the judge jurisdiction to make an order where the tenant fails to appear, if it appears to him that the tenant wrongfully holds against the right of the landlord. This jurisdiction is vested in the County Judge only where the tenant fails to appear following a notice as provided by the statute. If the statute has not been complied with the County Judge has no jurisdiction. On the other hand, subs. 2 of s. 77 confers quite a different jurisdiction on the County Judge. If the tenant appears the judge shall in a summary way hear the parties and their witnesses and examine into the matter, and after having done so the judge has jurisdiction to make an order if it appears to him that the tenant wrongfully holds against the right of the landlord.

I am of the opinion that the procedure that is provided by s. 75 is procedure for the purpose of informing the tenant of proceedings that are being taken against him, and that without that procedure proceedings may not be taken in his absence, but where, on being informed of the proceedings, he appears, then, notwithstanding that he may object to the regularity of the procedure by which he has been informed, his appearance nevertheless gives the judge jurisdiction to act under s. 77(2) and to proceed with the inquiry. This is the principle applied in criminal cases: see *Rex v. Isbell*, 63 O.L.R. 384, [1929] 2 D.L.R. 732, 51 C.C.C. 362 (where the accused vigorously protested the irregularity of the proceedings by which he was brought before the magistrate), and *Reg. v. Hughes* (1879), 4 Q.B.D. 614. *A fortiori*, these principles are applicable to proceedings under Part III of The Landlord and Tenant Act, which is a code of procedure for summary disposition of conflicting claims to possession between landlord and tenant.

In any case I am of the opinion that even if the tenant might have been entitled to rely on the irregularities in connection with the service of the appointment on an appeal from the eviction order of the County Judge made on 4th October, she precluded herself from thereafter contending that the County Judge was without jurisdiction when on 12th October she served notice of an appointment to review the former order, and sought to obtain, and did obtain, from the judge a favourable decision on the merits, which she now seeks to uphold on the ground that the County Court Judge had no jurisdiction. I think the remarks of Anglin J. in *In re Dewar and Dumas* (1904), 8 O.L.R. 141 at 142, are applicable to the facts of this case, although the facts of that case were somewhat different: "Where the tenant appears and takes advantage of an adjournment made for the express purpose of meeting his objection and then takes the chance of an adjudication upon the merits by the county court Judge he has, I think, effectively waived what he has himself treated as merely the irregularity which it seems in fact to be."

I have therefore concluded that the learned County Judge acted with jurisdiction.

It is argued that the tenant was not a monthly tenant, and that the notice to quit, which was given on the 19th January 1945 and expired on the 19th July 1945 was ineffective to terminate the tenancy.

The landlord and tenant entered into a written lease dated 13th August 1942, whereby the tenant rented the premises, "as a monthly tenant from August 20th, 1942 to August 20th, 1943, Tenant to be given possession on 20th August". The landlord states that prior to 20th August 1943, she wrote a letter to the tenant, and forwarded it by registered mail, advising her that she would keep her on as a monthly tenant and not by the year, and that she had changed her rental collection agent, and requesting the tenant to pay the rent monthly. The tenant contended that she received a letter from the landlord, merely advising her as to the change of agents and requesting her to pay the rent monthly instead of semi-monthly, but that the letter contained no mention of changing the tenancy from a yearly to a monthly one. The learned County Judge has found the facts on this issue in favour of the landlord, and I can see no reason for reversing his finding. On the facts as found by the learned County Judge, no implication of a tenancy from year to year

arises, and I think the notice to quit as served was effective to terminate the tenancy on the 19th July 1945.

The most difficult point of the appeal arises out of the contention that the landlord, by the acceptance of a money order sent as rent after the expiration of the notice to quit, thereby prejudiced the rights she would otherwise have had.

It appears that the tenant paid rent monthly in advance up to 19th July 1945. At some time subsequent the tenant offered to the landlord \$30 as rent for the current month, but the landlord refused to accept it. On the 20th August 1945, acting on the advice of the Rentals Administration, the tenant purchased a money order for \$60 and sent it to the landlord as rent for two months "so that she would not be in arrears." It is obvious that the purpose of sending this payment was to put the tenant within the protection of existing rental orders, the benefits of which do not enure to tenants whose rent is in arrear. The landlord received the money order but did not cash it and still holds it. She did not advise the tenant that the money order was not accepted as rent. She claims that she intended to apply it for use and occupation of the premises for the two months' period ending the 19th September 1945. On the 20th September the tenant sent a further money order to the landlord for \$30 as rent for the next ensuing month, but this was returned by the landlord. On 25th July 1945, Order 537 of the Wartime Prices and Trade Board ([1945] 3 C.W.O.R. 170) came into effect. The Order contains the following recitals:

"There exists a serious shortage of housing accommodation in Canada, which could not be avoided due to the urgent demands on labour and materials for war purposes. The Government has announced plans to cope with such shortage but such plans necessarily require time for fulfilment.

"In the meantime, a great number of notices to vacate have been given by landlords of self-contained dwellings throughout Canada on the ground that the landlord desires the dwelling for himself or for a member of his family. The majority of these notices have been given to families of men in the Armed Forces, many of whom are still overseas and unable to do anything to protect their families, while others have arrived or will arrive at their homes only to face eviction with no other shelter available for their families. In order to alleviate wide-spread distress, it is now necessary to protect all well-behaved tenants of housing

accommodation against dispossession until housing plans are developed and realized."

And it provides: "3. Subject to the provisions of Section 4 following, every notice to vacate given before July 25, 1945, under the provisions of Section 15A or Section 15B of said Order No. 294, by the landlord of any housing accommodation to the tenant thereof is hereby suspended; and every pending proceeding taken and every order or writ of possession issued to enforce the vacating of the accommodation by the tenant is hereby stayed, if the tenant is still in occupation of the accommodation on July 25, 1945." The notice to quit here in question was given pursuant to the provisions of s. 15B of Order 294.

Section 4(1) of Order 537 provides that where a landlord referred to in s. 3 desires to remove the suspension or stay provided by that section, he shall, not later than 31st August 1945, apply to the Court through the Rentals Appraiser for an order removing such suspension or stay. Under s. 4(5), if the Court decides to remove the suspension or stay of a notice to vacate on a date that is past at the time of the hearing, the Court may postpone that date to such date as it deems just, "in which case the term of the tenant's lease *shall be deemed to have been extended to and terminated on that date.*" (The italics are mine.) The order further provides that s. 15B of Order 294 shall cease to apply after 25th July 1945.

On 28th August, J. A. Jackson, sitting in the Court of Rentals Appeals, made an order, the operative part of which is as follows:

"AND IN THE MATTER OF the landlord's application under Section 4 of Order 537 of the Wartime Prices and Trade Board to the Court of Rentals Appeals.

"Upon reading the application of the landlord, the Notice to Vacate filed and other material adduced and upon hearing the parties thereto:

"IT IS ORDERED that the suspension or stay created by the provisions of Section 3 of Order 537 of the Board be and is hereby removed, effective the 15th day of September, 1945."

No proceedings have been taken to set aside this order, and as I read s. 4(5) of Order 537, the tenant's lease, which had been terminated by the notice to quit, was extended to and terminated on the 15th September 1945, by force of the provisions of

Order 537, quite irrespective of the argument which was addressed to the Court as to the acceptance of the money order for \$60 on the 20th August 1945.

The matter, however, was disposed of by His Honour Judge Barton on the second hearing in favour of the tenant on the ground that the acceptance of the money order prevented the landlord from relying on the termination of the tenancy by the notice to quit on 19th July 1945. In so finding he relied on *Hartell v. Blackler*, [1920] 2 K.B. 161, but a number of authorities in the English courts, which distinctly overrule this decision, do not appear to have been drawn to the County Judge's attention.

For the purpose of disposing of this aspect of the appeal I will assume that the money order received by the landlord on 20th August was accepted as rent.

In order to determine the effect of the acceptance of the rent on that date on the rights of the parties, it is necessary to examine with precision the legal position of the parties under the various Orders in effect at the relevant times.

There is no doubt that the notice to quit which expired on 19th July 1945 terminated the tenancy that had existed up until that time just as effectively as if the term had been a term certain which expired on that date.

"When once the notice to quit has expired the position of the parties is precisely the same as it would be if the original lease had provided for the determination of the term on the date mentioned in the notice. There is in that case no room for election by the landlord. The landlord and the tenant may of course agree that a new tenancy shall be created on the old terms, and that is what in effect they do when they agree that the notice to quit shall be waived. But the agreement to continue the tenancy must be proved. It must be shown that the parties were *ad idem* as to the terms": *Davies v. Bristow; Penrhos College, Limited v. Butler*, [1920] 3 K.B. 428 at 438. See also *Taylor v. Wildin* (1868), L.R. 3 Ex. 303; *Freeman v. Evans*, [1922] 1 Ch. 36.

From 19th July to 25th July, the landlord was proceeding to have the tenant ejected from the premises. On 25th July, Order 537 came into effect, suspending or staying all proceedings for recovery of possession of the premises by the landlord until an order should be made by the Court as defined under the

Order, removing the suspension or stay. The order removing the stay was not made until the 28th August, and did not come into effect until the 15th September. The payment of the rent was made while this stay was in effect.

The acceptance of rent after a notice to quit by the landlord, and permitting the tenant to remain in the premises, may be evidence of an agreement for a new tenancy on the old terms. But how is the mere acceptance of rent evidence of such an agreement in the circumstances of this case, where the landlord was powerless to get possession of the premises? The view adopted in all the English cases subsequent to *Hartell v. Blackler*, *supra*, is that where the tenant remains in possession after the notice to quit expires and the landlord is prevented by statute from taking proceedings that he would have been entitled to take otherwise, a new statutory tenancy is created for the term that the tenant occupies under the protection of the statute, and that the mere acceptance of rent during the term of the statutory tenancy does not affect the termination of the previous tenancy by the notice to quit when the statutory protection is lifted.

In *Hartell v. Blackler*, *supra*, a Divisional Court applied to a case where the landlord accepted rent after a notice to quit, the same common law principles that are applied in cases of the acceptance of rent after circumstances have arisen to the knowledge of the landlord giving a right to forfeiture. In *Davies v. Bristow*, *supra*, a Divisional Court expressly dissented from this application of the law and refused to follow *Hartell v. Blackler*. Shearman J., at p. 440, said:

“As long as s. 1, sub-s. 2, of the Rent Restriction Act, 1915, and s. 1 of the Act of 1919 are in force and a landlord is prevented from getting recovery of possession of premises after the expiration of a notice to quit, I think it is correct to say the former tenant by holding over no longer becomes a trespasser but is in lawful statutory occupation of the premises unless there is proved in fact any other lawful agreement subject to the provisions of the Act, which the landlord and tenant choose to make. I am the more ready to agree with *Hunt v. Bliss*, [1919] W.N. 331, in preference to *Hartell v. Blackler*, [*supra*], because I notice that in the latter case the expression ‘waiver of notice to quit’ is used throughout the report. It may be that it is not open to objection if it is clearly understood as referring

to an agreement for a new tenancy, but at the same time it cannot be disputed that it is a loose and unscientific expression in that connection. A notice to quit can be withdrawn at any time before the date fixed for the termination of the tenancy. But after the time has expired the lease is at an end and a landlord can no more waive his notice to quit than he can waive the effluxion of time. I infer that the expression 'waiver of notice to quit' wherever it is used in the report merely means that the parties have arrived at a new agreement, but that agreement to be any other agreement must be proved in the ordinary way. I think that what was decided in *Hunt v. Bliss* was this, that after the expiry of the notice to quit the tenant is entitled to continue in occupation under the provisions of the statute until those conditions arise which enable the judge in his discretion to order recovery of possession, or until the parties have arrived at a fresh agreement."

Lush J., at p. 437, expressly dissents from the decision in *Hartell v. Blackler*. After Order 537 was passed, the combined effect of the Canadian Orders was substantially the same as that of the English Act under which *Davies v. Bristow* was decided. In 1920 the English Act, 10-11 Geo. V, c. 17, was amended by adding s. 16(3), which I quote as it is referred to in subsequent decisions and counsel for the tenant seeks to rely on the fact that no similar provision is contained in our Orders:

"16. (3) Where the landlord of any dwelling-house to which this Act applies has served a notice to quit on a tenant, the acceptance of rent by the landlord for a period not exceeding three months from the expiration of the notice to quit shall not be deemed to prejudice any right to possession of such premises, and, if any order for possession is made, any payment of rent so accepted shall be treated as mesne profits."

It will be observed, however, that the decisions subsequent to this amendment do not turn on this section, and that it is stated that the law is in any case as set out in the section, quite irrespective of the statute.

In *Shuter v. Hersh*, [1922] 1 K.B. 438, Bankes L.J. expressly approves of the passage from the judgment of Shearman J. to which I have referred and, at p. 446, states:

"The landlord's position throughout is that he does not want the tenant to continue as his tenant, but the tenant is a statutory tenant, and the landlord cannot prevent his being a statutory

tenant, and he only gives him the notice to quit because he wants the increased rent, and even if the landlord gets an increase of rent, the tenant is still a statutory tenant. I cannot see any materials upon which one can come to the conclusion that a fresh tenancy was created."

The learned judge is there referring to a procedure under the English law to secure increased rent. And Scrutton L.J., at p. 450, states:

"It follows from what I have said that, in my view the correct view of the law was taken in *Davies v. Bristow* [*supra*], and that, so far as the Rent Restriction Acts are concerned, *Hartell v. Blackler* [*supra*], can be no longer relied upon as an authority. I think that *Hartell v. Blackler*, which must have been reported just before the Act of 1920 was passed, affords the explanation why s. 16, sub-s. 3, was put into the Act. The Legislature evidently did not approve of *Hartell v. Blackler*, but thinking that *Hartell and Blackler was the law*, [the italics are mine] they provided that at any rate for a period of three months the acceptance of rent should not prejudice the right of the landlord to possession. If, however, *Hartell v. Blackler* is not the law, and the law is as stated in *Davies v. Bristow*, there is no reason why it should be taken that acceptance of rent after the expiration of the three months should prejudice the position and create a new tenancy."

The matter finally came before the Court of Appeal in *Felce v. Hill* (1923), 39 T.L.R. 673. At p. 674, the Master of the Rolls said:

"The whole question in the present case was, What were the terms upon which the occupier remained in possession? It was said that she became a tenant from year to year because she paid rent. But if the landlord could not get rid of her, and if, because he could not get rid of her he accepted the rent which she paid, that was quite a different case from the ordinary position of the creation of a new tenancy. Where the tenant continued in occupation as a statutory tenant, did the receipt of rent by the landlord raise the implication that he was accepting the tenant as a tenant from year to year? In his (his Lordship's) opinion it was clearly decided that that was not so in *Davies v. Bristow* (36 *The Times* L.R. 753; [1920] 3 K.B. 428) and *Shuter v. Hersh* (38 *The Times* L.R. 127; [1922] 1 K.B. 438), and in *Newell v. Crayford Cottage Society* (38 *The Times*

L.R. 355; [1922] 1 K.B. 656), which was expressly approved by the majority in the House of Lords in *Kerr v. Bryde* (39 *The Times* L.R. 61; [1923] A.C. 16). Those cases were extremely valuable because the Divisional Court in *Davies v. Bristow* (*supra*) and *Shuter v. Hersh* (*supra*) refused to follow a previous decision of the Divisional Court under the earlier Act, in which the argument now used by the present appellant prevailed."

Warrington L.J., at p. 674, said:

"On March 25, 1918, the tenant became a tenant on sufferance, or at best tenant at will, and, but for the Act of 1920, the landlord would have been entitled to obtain possession without giving any notice to quit. Had the mere fact of payment and acceptance of rent converted the tenancy which then existed into one from year to year? Such conversion, if it took place at all, resulted from an inference of fact, that the landlord and tenant had entered into a new agreement. In the present case that inference could not be drawn, because here payment and acceptance of rent were referable not to any intention to create a tenancy from year to year, but to the fact that the tenant was holding over as a statutory tenant under the Act, and was bound to pay the rent."

The same point has been recently before the Court of Appeal in England on two occasions, in *Thompsons (Funeral Furnishers) Ltd. v. Phillips*, [1945] 2 All E.R. 49, where *Davies v. Bristow* is again quoted as an authority, and in *Morrison v. Jacobs*, [1945] 2 All E.R. 430, where MacKinnon L.J., at p. 432, said:

"I am quite satisfied that that last contention of the tenant is entirely without foundation and that it is so is sufficiently shown by the principle of the decision of *Davies v. Bristow*, [*supra*]. At common law if the landlord has acquired a right to claim possession against his tenant and instead of exercising that right he allows him to remain in the house and accepts rent from him as before, the parties by their conduct may with reason be held to have entered into a new contract of demise. But the essential factor in those circumstances is that the landlord voluntarily abstains from turning the tenant out. When the tenant remains in possession, not by reason of any such abstention of the landlord but because the Rent and Mortgage Restriction Acts deprive the landlord of any power of intervention, no

such inference can properly be drawn. That is the basis and the very obvious and cogent basis of the decision in *Davies v. Bristow*.

"The only other thing I wish to say is that some reliance was placed by counsel for the respondent upon sect. 16(3) of the 1920 Act, which, referring to acceptance of rent by the landlord for a period after the expiration of the notice to quit, refers to it as acceptance during the period of three months. I gather the suggestion of counsel for the respondent was that after the three months the acceptance of rent would afford some evidence of the creation of a new tenancy. The answer to that suggestion is, I think, found quite clearly in a passage in the judgment of Scrutton, L.J. in *Shuter v. Hersh*, [*supra*] at p. 540.

" 'If, however, *Hartell v. Blackler*, is not the law, and the law is as stated in *Davies v. Bristow*, there is no reason why it should be taken that acceptance of rent after the expiration of the three months should prejudice the position and create a new tenancy.' The real truth is that counsel for the respondent in this argument of his is seeking to rely upon the decision in *Hartell v. Blackler*, which was held to be wrongly decided in *Davies v. Bristow*."

It is quite clear that, on the law as it now is in England, and as it should be applied in our courts, the tenancy that had previously existed came to an end on 19th July 1945, and from that date to 25th July the landlord did nothing from which an agreement for a new tenancy could be inferred. On 25th July Order 537 created a statutory tenancy under which the payment of rent did not in any way afford evidence of an agreement for a new tenancy, or affect the termination of the previous one. On 15th September the statutory tenancy terminated, and on 4th October and 18th October, the dates of the respective hearings before His Honour Judge Barton, the tenant was holding the premises without lawful right.

Any other view of the law would create great hardship on landlords who had either terminated a tenancy by notice to quit prior to Order 537, or where leases expired subsequent to the Order, and particularly those expiring subsequently to 31st August 1945. To give the effect to the Orders contended for by counsel for the tenant, in my view, would be going far beyond their purpose and meaning.

I would allow the appeal with costs and direct that an order go for the issue of a writ of possession directed to the Sheriff of the County of York.

Appeal allowed with costs.

Solicitors for the landlord, appellant: Mason, Cameron & Brewin, Toronto.

Solicitor for the tenant, respondent: Myer R. Solomon, Toronto.

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